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DIGEST XII. 1 and 4–7
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DE CONDICTIONIBUS

Edited

with Translation & Notes

by

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PREFACE

The Latin text of these Titles is that of Mommsen's stereotype edition of the Digest, but I have collated it with the very useful Milan edition of the Digest, published in 1908. For the translation, I have had the advantage of being able to consult the previous versions of Dr Bryan Walker and Mr C. H. Monro, but it is my own work, and any errors which may come to light must be laid to my charge. I must also acknowledge my indebtedness to Dr Walker in respect of many of the notes. Professor Buckland, with his usual readiness to help those in need, has read through the proofs and made a number of valuable suggestions which I have adopted, and for which I am grateful.

D. T. O.

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ABBREVIATIONS AND REFERENCES

h.t.	huius tituli
s.v.	sub voce
C.	*Codex* of Justinian
D.	*Digest*
G.	*Institutes* of Gaius
J. Inst.	*Institutes* of Justinian
B G B.	German Civil Code
B.	Buckland, *Text Book of Roman Law*
Buckland	*Law of Slavery*
Cornil	*Droit Romain*
De V.	De Visscher, *La Condictio et Le Système de la Procédure formulaire*
De Zulueta	*Supplements to the Institutes of Gaius*
Girard	*Manuel Élémentaire de Droit Romain*, 8th ed.
Greenidge	*Legal Procedure of Cicero's Time*
Lenel	*Das Edictum Perpetuum*, 3rd ed.
Planiol	*Traité Élémentaire de Droit Civil*, 10th ed.
Roby	*Roman Private Law*
Savigny	*Römische Rechtsgeschichte*
Schuster	*German Civil Law*
von Koschembahr-Lyskowski	*Die Condictio als Bereicherungsklage im klassischen römischen Recht*
Winfield	*Province of the Law of Tort*

INTRODUCTION

The term Condictio was derived from the formal notice required by the latest of the ancient forms of process known as *legis actiones*, introduced by a Lex Silia (of uncertain date) for the recovery of a definite sum of money and extended by a Lex Calpurnia to claims for the recovery of any certain thing. In the formulary system, the corresponding action was at first known as the *actio certae creditae pecuniae* and the use of the word *condictio* to denote it was probably of late introduction, after the *legis actio* had ceased to be available as an alternative process.[1] Gaius remarks that the use of the term is not appropriate[2] and Justinian in the Institutes states that it is used *abusive*.[3]

Nevertheless, in the course of the classical period, it became the technical designation of an action *in personam*, with an *intentio* in abstract form, for the recovery of a sum certain in money or any certain thing, on a contract or quasi-contract, and *stricti iuris* (as opposed to actions *bonae fidei*).[4] Towards the end of the period, probably about the time of Hadrian or Trajan,[5] the action was extended to a limited class of claims for an *incertum* on the principle of restoration of unjustifiable enrichment. Unless the original text of Gaius[6] has been altered by interpolation or we admit with Professor von Koschembahr-Lyskowski that an obligation *facere* might give rise to a claim for a *certum*,[7] it appears clear that by the time of Gaius a *condictio incerti* must have been recognised in some cases.

[1] B. p. 682.

[2] "nunc vero non proprie condictionem dicimus actionem in personam esse qua *intendimus* dari nobis oportere: nulla enim hoc tempore eo nomine denuntiatio fit" (IV. 18).

[3] "nunc vero abusive dicimus condictionem actionem in personam esse qua actor intendit dari sibi oportere. nulla enim hoc tempore eo nomine denuntiatio fit" (IV. 6. 15).

[4] Savigny, App. XIV, §§ 25 and 26.

[5] De V. p. 6, n. (3). See also B. p. 683, and Girard, p. 654, n. 3.

[6] "appellantur in personam actiones quibus dari fierive oportere intendimus condictiones" (IV. 5). Cf. J. Inst. IV. 6. 15.

[7] *Die Condictio als Bereicherungsklage im klassischen rom. Recht*, II, pp. 284–90.

In both the *legis actio* and the formulary process a special characteristic of the *condictio* was the abstract form of the claim.[1] There was no reference to any particular *causa*, or ground of action. As distinguished from other actions *stricti iuris*, such as the *actio ex stipulatu* (i.e. brought to enforce a stipulation for something other than a *certum*) and the *actio ex testamento*, the formula did not indicate the ground of obligation, it did not prescribe to the *iudex* any point of fact or law to the verification of which his judgment was limited.[2] The essential requisite was the certainty of the subject-matter of the claim. As long as the plaintiff could show that he was entitled on any ground recognised by law he ought to succeed.[3]

In the classical writings we find distinctions made according as the claim is for *certa pecunia*, for *certa res*, or for an *incertum*. These terms, however, are not frequent and the texts in which they appear are all suspected of interpolation.[4] As already indicated, the extension of the action to claims for an *incertum* was of late introduction. Professor Buckland says: "There was only one action called *condictio*; it was a general abstract action with many applications. There is little doubt that in the formulary system the name *condictio* was first applied to claims of a certain sum under a *iure civili* obligation."[5]

But the action to recover a certain sum is normally called *actio certae pecuniae creditae*, though the jurists of the Empire speak of it as *condictio*.[6] In this action, the parties were required to enter into a *sponsio et restipulatio tertiae partis*.[7] It was not required where the claim was for a *certa res*. This is usually supposed to have been required by the Lex Silia, but it is not mentioned in connection with that law by Gaius

[1] For the *legis actio per condictionem*, see the new text of Gaius IV. 17 *b* published by Professor Arangio-Ruiz, included in *Supplements to the Institutes of Gaius* by Professor De Zulueta of Oxford (Oxford University Press).

[2] De V. p. 6.

[3] Cicero, *Pro Roscio Comoedo*, §§ 4 and 5.

[4] *C. certi* is found in two texts only (D. 12. 1. 9 pr. and 3; and D. 46. 2. 12), both suspected of interpolation. See Girard, p. 523, n. 2. According to some writers, the term *c. incerti* is in all cases a post-classical interpolation. See De V. p. 6, n. (3).

[5] B. p. 682.

[6] G. III. 91.

[7] G. IV. 171; Cicero, *Pro Roscio Comoedo*, § 4.

and may well have been a condition attached to the formulary action by the Praetors.[1]

The formula of the *actio certae creditae pecuniae* is given in Gaius as follows: "Si paret $N^mN^mA^oA^o$ sestertium x milia dare oportere iudex $N^mN^mA^oA^o$ sestertium x milia condemna, si non paret absolve."[2] Where the claim was for *certa res* (the *c. triticaria* of the Digest) it would take the form: "S.p. $N^mN^mA^oA^o$ tritici modios centum dare oportere, quanti ea res sit iudex $N^mN^mA^oA^o$ condemna, s.n.p.a."[3] The formula in these cases had no *demonstratio*. The *intentio* contained no mention of the *causa*. Cicero describes it as the *derectum asperum simplex* "*Si paret dare oportere*".[4] Where the claim was for *certa pecunia* the *condemnatio* also was *certa*. Where the claim was for *certa res* (as distinct from *pecunia*) the *condemnatio* would be *incerta*.

The reconstruction of the formula of the *c. incerti* is a matter of controversy. It appears certain that there was no formula for it in the Practor's Edict. It is conjectured that the *intentio* specified the nature of the relief claimed, e.g. "S.p. N^mN^m eam stipulationem quam AA ei repromisit, A^oA^o acceptam facere oportere" followed by a *condemnatio incerta* for "quanti ea res sit".[5]

One of the earliest applications of the *condictio* as a *legis actio* was to the recovery of money lent without the security of a *stipulatio* or *nexum* for its return. It is possible that, at first, the lender, in the case of an informal loan, had no remedy, but later, even before the introduction of the *condictio*, he appears to have been allowed an action on the equitable ground of unjust enrichment. Afterwards, the informal agreement came to be recognised as a distinct contract, *mutuum*, but continued to retain traces of its original quasi-contractual character. Only the equivalent of the money lent could be recovered; interest could not be claimed unless there was a formal stipulation to

[1] See De Zulueta, *Supplements to the Institutes of Gaius*, p. 9. Another feature of the action is the institution of the decisory oath (*iusiurandum necessarium*) which may have had a similar origin. See B. pp. 618, 633, and Greenidge, pp. 260–2.

[2] IV. 33, 41, 49, 50; Lenel, p. 231.

[3] De V. p. 6; Lenel, p. 234.

[4] *Pro Roscio Comoedo*, § 11.

[5] De V. p. 98; Lenel, p. 156.

pay it, at any rate until late in the classical period.[1] Another early example of the use of the *condictio* to enforce restitution on the same principle is the *c. furtiva*.

The abstract character of the action enabled the jurists, within certain limits presently to be indicated, to employ the *condictio* to enforce restitution in other cases where, according to the current views of what was equitable, the ancient principle[2] forbidding unjust enrichment was applicable. But the restriction of the action to claims for a *certum* at first confined the use thus made of the *condictio* to a comparatively narrow compass. Apart from claims for a definite sum of money or other certain thing arising on a formal contract and the anomalous case of restitution of stolen property, the action was available only where there had been a transfer of ownership (*datio*) of something certain.[3] Towards the end of the classical period, as already mentioned, the scope of the action was extended to certain cases where the claim was for an *incertum*.[4] This was probably effected by adapting the formula applicable to claims for *certa res* with its *incerta condemnatio* clause "quanti ea res sit" to a few claims involving the doing of some act (*facere*) or other relief of a clearly defined character.

The change from the formulary system of procedure to the administrative system (*cognitio extraordinaria*) led to radical alterations in the nature and scope of the *condictio*. The certainty of the claim ceased to be objective. It was sufficient if the plaintiff made a definite pecuniary estimate of his demand at the risk of incurring the penalties of *plus petitio*.[5] In the classical period the certainty required was in the act or fact giving rise to

[1] Girard, p. 637, nn. 2 and 4. Cf. D. 12. 1. 40.

[2] D. 12. 5. 6 (Ulpian ad Sabinum).

[3] Cf. Cicero, *Pro Roscio Comoedo*, § 14 (the action being *certae creditae pecuniae*): "Haec pecunia necesse est aut data aut expensa lata aut stipulata sit."

[4] These cases were of a very limited class, see Girard, p. 654, n. 3.

[5] The disuse of the formula led to a change in the view taken of *plus petitio*. Originally it was involved in the terms of the formula itself when the action was for a *certum*. The only question for the *iudex* was whether the actual sum mentioned in the *intentio* was due. If the plaintiff did not prove that it was due he failed altogether (Cicero, *Pro Roscio Comoedo*, § 4). But later it came to be regarded as involving a penalty for an excessive claim and the strictness of its operation was modified by enactments of Zeno and Justinian. See De V. pp. 122–3.

the obligation, but under the later procedure it was sufficient for the plaintiff to claim a definite sum of money, leaving it to the judge to determine what the amount of his award should be. The *condictio* thus became a general form of action *in personam*,[1] which could be resorted to as an alternative for the enforcement of any obligation provided that the plaintiff put forward his claim as being for a definite sum of money. When thus used in cases where a special action (e.g. *mandati*, *venditi*, etc.) also applied, the rules applicable to the special action would attach to the *condictio*.[2] This generalisation of the use of the *condictio* appears to have been a gradual process and did not reach its full development until the Byzantine period. It is reflected in the much debated passage from Ulpian in D. 12. 1. 9 pr., which has undoubtedly been subjected to interpolation by the compilers of the Digest or some previous post-classical jurist.

Already in the classical period the *condictio* had become an alternative remedy in cases where it was possible to confine the claim to a definite sum of money or thing acquired by the defendant in connection with some obligation for which some special action was ordinarily available, e.g. for restoration of a pledge remaining in the hands of the creditor after the debt had been paid[3] or of the *arrha* which had not been returned on completion of a contract of sale.[4] The Institutes show it also as an alternative action wherever the master or *paterfamilias* was liable *in solidum* on the contracts of a slave or *filiusfamilias*.[5]

Furthermore, although in the texts of the Digest and the Institutes of Justinian the distinction of actions *in personam* into *stricti iuris* and *bonae fidei* is still treated as existing, it has lost much of its significance in matters of procedure with the disuse of the *formula*. In the law of Justinian the distinction is, in practice, no longer one of actions but of *negotia*.[6] Certain

[1] The *c. generalis* of the Byzantine period. See De V. ch. v; B. p. 684; Girard, p. 650, nn. 2 and 3.

[2] De V. ch. v. pp. 11; *et seq.* This gave rise in the Byzantine period to the doctrine of "natura actionis" by which the *condictio* when used in place of some other action of a special nature was supposed to attract to itself the rules applicable to such special action. See De V. pp. 135 *et seq.*; Collinet, *Études historiques sur le droit de Justinien*, pp. 192 *et seq.*

[3] D. 12. 1. 4. 1.

[4] D. 19. 1. 11. 6.

[5] J. Inst. IV. 7. 8; D. 12. 1. 29.

[6] For *negotium* see B. p. 180.

negotia are *stricti iuris*, others *bonae fidei*. The distinction is one of substantive law not of procedure.[1]

The disparate classification of various types of *condictio* contained in the titles of the Digest under consideration is no doubt due to the compilers. There are traces in the classical writers of a tentative classification of *causae* giving effect to the principle of restitution of unjust enrichment.[2] It is restricted to cases of *datio* and is reflected in the distribution of the titles 12. 4 to 8.[3] The *c. ex causa furtiva* appears to have been early distinguished by a special name. The *c. ex lege* has no reference to *causa* and the rubric is probably Byzantine.[4] The title *triticaria* simply indicates the nature of the object of the claim. The designation is probably post-classical.[5]

It has been pointed out earlier that the *condictio* was a single action. The various qualifying epithets which appear in the rubrics of the Digest represent technical terms which no doubt became current in practice or in the schools of law.[6] This was also the case with other terms used for purposes of distinction but not made the subject of separate treatment by the compilers, such as the *c. ex poenitentia*.[7]

We can now proceed to give a brief synopsis of the contents of the titles on the subject.

I. The title **12. 1**, *De rebus creditis si certum petetur*, treats of (1) the general rules applicable to the *condictio* when the claim is for anything definitely ascertained (*certum*) and (2) in particular, of the conditions giving rise to the action when the claim arises from a loan for consumption (*mutuum*) or other obligation for the payment of a definite sum of money. The following is a summary:

1. Meaning of "credere" and "creditum" (1. 1). A *condictio certi* is founded on a *creditum certum* and is available when

(*a*) there is a transfer of money or other property by one person to another trusting to the good faith of the latter to give

[1] Cornil, p. 483.
[2] D. 12. 5. 1 (Paulus ad Sabinum); 12. 6. 52 (Pomponius ad Q. Mucium); 12. 6. 65 pr. (Paulus ad Plautium).
[3] De V. pp. 86–9.
[4] B. p. 547.
[5] B. p. 683.
[6] De V. p. 82.
[7] B. p. 547.

an equivalent in return (1. 1; 9. 3–7; 32); whether the transfer is made personally or by an agent on our behalf (9. 8).

The rule was, after some hesitation, established that when a man paid money on account of another, whether requested to do so or not, the person on whose behalf the payment was made could sue the recipient for the money (D. 45. 1. 126. 2). ["It is in fact the ordinary case of a banker making investments for his customer, whether he happen to have at the time and to use money which has passed through his customer's hands or not" (Roby, II, p. 68).] Also whether the transferee receive the property personally or through the agency of some other person purporting to act as agent on his behalf, such as an agent acting for a municipality or an *institor* (9. 2; 27; 29).

(*b*) a definite thing or sum of money becomes due under a stipulation or other formal contract (6; 9 pr.; 19 pr.; 36).

(*c*) in a few cases (at a late stage of the classical period) where *possession* has been transferred in similar conditions (23; 31. 1).

The obligation may be conditional (7; 8).

2. A *condictio certi* arises

(1) on a loan of money, a kind of *mutuum* (2).

How *mutuum* differs from *creditum* (2 pr.–4; 13. 2; 22).

(*a*) when property and possession have been transferred actually or *brevi manu* or *longa manu* (9. 9; 10; 11 pr. and 1; 15; 30).

Where an agent had collected money and the principal agreed that he should hold it as a loan, without the money being first handed over, opinions differed as to whether a *mutuum* was created. Africanus held that it was *mandatum* only (17. 1. 34 pr.), Ulpian held that a *mutuum* was constituted (15).

(*b*) when the transferor was owner of the money or other thing delivered, or was acting with the consent of the owner, express or implied, as in the case of a slave having free administration of his *peculium* (16; 11. 2; 41).

(*c*) when there is a present intention on both sides to create a *mutuum* (18; 19 pr.); even though the money was given to the lender by the borrower under a condition that it should be handed back as a loan (20); and even if the receiver's intention was to take the loan from another person (32).

(2) when a definite thing or sum of money is due under a stipulation or other formal contract (24), provided that the contract be certain and unconditional (36; 37; 38; 39).

(3) on an obligation arising when some definite thing or money, received improperly but in good faith, has been consumed or expended by the receiver, who has thus been unjustifiably enriched.

Consequently after consumption a *condictio* will lie, notwithstanding (*a*) mistake in the ground of the transfer or as to the person lending money (18 pr. and 1; 23; 32), (*b*) defect of ownership in the transfer (11. 2; 13; 14; 19. 1), (*c*) want of capacity on the part of the transferor (12; 19. 1).

The *condictio* is to be brought by the person on whose account the money has been paid (26).

It cannot be brought by a *filiusfamilias*, but he may obtain relief *extra ordinem* (17).

Provincial governors or other officials may not lend money and therefore cannot have a *condictio* for money lent (33), unless their office is permanent (34). But governors of provinces may borrow (34. 1). All accruals to the thing claimed after *litis contestatio* may be recovered in a *condictio* (31 pr.).

Condictio lies against the receiver or against the person on whose account an agent receives (27; 29). It may be brought although there is collateral security (28).

Although some authorities hold that the claimant is not bound to accept a tender of part, the more reasonable view is that it should be accepted and a *condictio* brought for the balance (21).

II. The title **12. 4** treats of the *condictio* termed *causa data causa non secuta*. This rubric is not found elsewhere and is difficult to construe. Roby thinks its proper designation should be *ob rem dati re non secuta*, following Celsus in h.t. 16 and Paul in h.t. 9 pr. and 14 (see Roby, II, pp. 77–8, footnote). The action is to recover money or other property (or its equivalent in value) which has been handed over for a purpose which has failed, e.g. emancipation of a son, manumission of a slave, as a security for a *dos*, or as a condition of acceptance of a legacy or

an inheritance. The *condictio* also lay where the event did not fail to follow, but the supposed ground for payment was a mistake, e.g. where the slave to be manumitted turned out to be a freeman, or the condition of acceptance of a legacy was found to be revoked by a codicil (1; 3. 7; 5. 3 and 4).

Mere general expectation of some advantage in consequence of a gift which fails to materialise is not a ground for recovery (3. 7). Hence the general conditions for this variety of *condictio* were

(*a*) that the plaintiff has parted with property (1) or given an *acceptilatio* (4; 10).

(*b*) in consideration of something to be given in exchange (16) or some act (1 pr.; 3. 2 and 3) or forbearance (1 pr.; 3 pr. and 1).

(*c*) where the other party either intentionally or negligently has failed to carry out what he has undertaken (3. 1–4; 5. 4; 9. 1; 11; 14; 15; 16; see also 12. 6. 65. 4), or it becomes impossible of fulfilment without fault on the part of the first party (1. 1; 2; 6; 8; 9 pr.; 13; 16; see also 12. 6. 65. 3), or was impossible from the outset (3. 5–8), or the donor has changed his mind—*c. ex poenitentia re infecta*—(3. 2 and 3; 5 pr.; 5. 1–3) and gives notice thereof (5. 1 and 2), but the other party must be indemnified in respect of any expense incurred (5 pr.). The action must be brought by the person on whose account the payment or transfer was made (6; 7 pr.; 9 pr.).

III. 12. 5, *De condictione ob turpem vel iniustam causam*, deals with the *condictio* to recover money or other property parted with under illegal pressure or for a disgraceful or illegal purpose. In the Code there are two distinct titles dealing with the subject-matter, C. 4. 7, *De c. ob turpem causam* and C. 4. 9, *De c. ex lege et sine causa vel iniusta causa*. In the case of both the *c. ob iniustam causam* and the *c. ob turpem causam*, as in the *c. furtiva*, the defendant is liable not only to the extent of his enrichment, but for all damage ensuing, without being excused by the loss of the subject-matter by inevitable accident (Girard, p. 661).

(*a*) This *condictio* is available when plaintiff has parted with property for a consideration disgraceful to the receiver, e.g. that the latter should abstain from sacrilege or theft or homicide or

should return a deposit which he was wrongfully detaining (1; 2 pr. and 1; 4. 2; 6), but not disgraceful to himself (2. 2; 3; 4 1 and 2): or when the transfer is the direct or indirect result of violence (7).

(*b*) It may be brought whether the wrongful purpose has been effected or not (1. 2; 5; 9; see also 12. 6. 36).

(*c*) It cannot be brought if the purpose of the transfer is disgraceful to both parties (2. 2; 3; 4; 8).

Where a litigant, with a just cause, gave money to the Judge to obtain a decision in his favour, some jurists thought he was entitled to recover on the ground that the turpitude of the payment was confined to the recipient, but Severus decided that in such a case both were guilty of corruption and that the money could not be recovered.

IV. In **12. 6**, *Condictio indebiti*, the designation of the *condictio* when employed as a remedy for the recovery of money or other property paid or transferred on the erroneous assumption that it was due in discharge of a debt or other obligation, is discussed at length. When money has been paid or property parted with in error as to matters of fact, without being due under either a legal or natural obligation, this *condictio* could be brought for restitution. The remedy was extended in course of time to the recovery of possession or the rescission of acts where there had been error, so that the *condictio* might in special cases be for an *incertum* (15. 1 and 2; 22. 1; 40. 1). As a general rule the error must be one of fact and not of law. But the line between law and fact is difficult to draw: and in some cases (e.g. 23. 4; 26. 12; 59; 64) the action is stated to be available where the mistake appears to have been one of law, so that the application of this rule is not very clear. The same difficulty has arisen in modern English law and other legal systems.

1. A payment is *indebitum* and therefore gives rise to a *c. indebiti*

(1) when not due either under a civil or natural obligation

(*a*) because paid in respect of a *causa* which never in fact existed (2. 1; 22 pr.; 23 pr.; 26. 2 and 10; 34; 37; 38. 3; 41; 58; 67 pr.):

(*b*) or one which although it once existed has ceased to exist before payment (25; 54; 59):

(*c*) or which existed only as a natural obligation and such natural obligation has been satisfied (38 pr., 1, 2):

(*d*) because paid to a person who is not the real creditor (22 pr.; 26. 11; 65. 9); but payment of rent to an ostensible owner under a hiring contract with him is not a payment to the wrong person (55):

(*e*) because paid by a person who is not the real debtor (19.1; 65. 9): but a payment is not *indebitum* if paid by another *on behalf of* the real debtor (44):

(*f*) because what is handed over is not what is owing (19. 3; 26. 4 and 14; 32 pr. and 3):

(*g*) because paid in excess of what is really due (19. 4; 20; 26. 5, 6 and 13; 39; 45):

(*h*) when made in pursuance of a supposed compromise, which was not made or is void (23 pr., 1; 26. 10; 65. 1).

(2) when the obligation is in suspense and payment is *not yet* due under either a civil or natural obligation, because dependent on an unfulfilled condition which may never come to pass (16; 18; 48; 56). Hence a payment made in respect of an obligation to arise at an uncertain date is *indebitum*, but not a payment in respect of an obligation to arise at a date certain to arrive, or on a condition certain to come to pass (10; 17; 18; 56; 60. 1; 65. 2).

(3) when the payment is in respect of an obligation which although good by the *ius civile* is not binding naturally and can be met by an *exceptio perpetua* (24; 26. 3 and 7; 32. 1; 40. 2; 43; 56); provided the *exceptio* is one granted for the protection of the debtor and not merely as a bar to the creditor's action (19 pr.; 40 pr.).

(4) when due naturally but in respect of a claim prohibited by statute (e.g. excessive interest) (26 pr. and 1).

2. A payment is not *indebitum* if due under a natural obligation (8; 9; 11; 13; 14; 26. 12; 28; 32. 2; 38 pr., 1, 2; 51; 60 pr.; 64; 67 pr., 4), and, of course, if due civilly as well (30; 35; 36; 42; 59), even though the payment may not involve acquittance, e.g. when a slave is given, in pursuance of an

obligation, who is *statuliber* (63); nor, if made in pursuance of a judgment (60 pr.; cf. C. 4. 5. 1 and D. 17. 1. 29. 5) or a compromise (23 pr., 1; 65. 1), unless the compromise is invalid or forbidden by law (23 pr., 1–3; 65. 1).

3. The *c. indebiti* can only be brought when the payment has been made in ignorance that it was not due (1. 1; 24; 26. 2, 3, 7, 8; 50; 62). But an erroneous payment cannot be recovered if the rights of an innocent third party would be prejudiced (12. 4. 9. 1). In the case of persons under incapacity ignorance is presumed (29). When the person making the payment was in doubt and provided for the return of the money if it proved *indebitum*, the action should be on the contract (2 pr.).

The *condictio* is to be brought by the person on whose account payment has been made (6 pr.; 47; 53; 57; 67. 2), or by his heir (12), and not necessarily by the payer (6. 3; 36; 44; 46; 47); although the latter sometimes has a *condictio utilis* (6 pr.; 53; 67. 1).

A *c. utilis* may sometimes be brought by a person whose interest is affected, although payment has not been made by him or on his account (3; 4; 5; 61).

The *c. indebiti* lies against the person who receives payment (6. 1, 2; 49). But a person is considered to be the receiver who directs payment to be made to his agent, or ratifies a receipt by a *negotiorum gestor* (6. 2; 57. 1; D. 12. 4. 14).

The *condictio* may be brought to recover possession of a thing or to receive a *cautio* or to cancel one (15. 1; 31; 39). Fruits of the thing may be claimed; necessary expenses must be allowed for (15 pr.; 26. 12; 65. 5).

The *condictio* being *stricti iuris*, interest cannot be claimed (C. 4. 5. 1).

The *condictio* can be brought anywhere, even though the payer thought himself bound to pay in a certain place (27).

V. In 12. 7, under the rubric *De condictione sine causa*, a few special cases are discussed in which restitution may be claimed on the ground of the absence or invalidity of *causa* and which the compilers of the Digest apparently found difficult to include under the three preceding titles. The expression *Condictio sine causa* is used in a wide and a restricted sense. In the wider

sense it is concurrent with the three preceding rubrics, *c. causa data c. non secuta* (1. 1 and 2; 4; 5), *c. ob turpem vel iniustam causam* (3) and *c. indebiti* (1 pr.). In the restricted sense it is applied to the particular examples given in this title, e.g. to procure the cancellation of a document (1 pr.; 3; cf. D. 12. 6. 31), to recover a payment made for a cause originally valid but which has been subsequently avoided (1. 2 and 3; 2; 4; cf. D. 12. 1. 31. 1; 12. 1. 32). But a *condictio* cannot be brought unless there is some business relation (*negotium*) between the parties (D. 12. 6. 33).

VI. **13.** 1 deals with the *condictio furtiva*, more properly designated *condictio ex causa furtiva*, brought to recover what has been stolen. Gaius points out that it was anomalous in that it was a claim by the owner to have the ownership transferred to him, *dare oportere*. He explains it as having been allowed "*odio furum*" (IV. 4). The anomaly may, however, be accounted for on practical grounds (B. p. 583; Roby II, p. 83). It was a quasi-contractual action and independent of the penal *actio furti*.

It was available only to the owner of the thing at the time it was stolen (1; 12 pr.; 18; D. 13. 3. 1. 1; 2), or to the heir of the owner but not to a legatee (11; 14 pr. and 1). If the owner, after the theft, had voluntarily parted with the ownership, he could not bring the *condictio* (10. 2 and 3; 12. 1). But a *c. incerti* could be brought by a person robbed of possession (12. 2).

The action lay against the thief or his heir (2; 5; 7. 2; 9; 10 pr. and 1), but not against one merely giving aid and counsel (although the *actio furti* did) (6).

It lay against a person having *potestas* over the thief to the extent of his enrichment (4; 5; 19); but not against a slave himself, if subsequently manumitted (although the *actio furti* did) (15).

It lay against a *filiusfamilias* (5).

The claim was for the thing itself, if still in existence (8 pr.; 14. 2); or for any part of it still existing (14. 2 and 3); or, if it no longer existed, for its highest value since the time of the theft, however its value may have been diminished or increased (7. 2; 8 pr. and 1; 13; 16; 20). But the *condictio* could not be

brought if the owner had recovered the thing, or it had been tendered to him, or the claim had been compromised (8 pr.; 10 pr.; 17). Fruits and profits might be included in the claim (3; 8. 2).

The *c. furtiva* could be brought even though the *actio furti* had been compromised (7 pr. and 1).

VII. In **13. 2** under the rubric, *De condictione ex lege*, a single extract from Paul is given from which it appears that when an obligation has been introduced by a *nova lex* and no form of action is prescribed for its enforcement the process will be by *condictio*. *Nova lex*, according to Savigny, means an enactment subsequent to the Lex Æbutia, but other writers interpret it as meaning a *lex* subsequent to the XII Tables. This category of *condictiones* stands by itself and is not founded on any basis of legal principle such as may perhaps be claimed for the other divisions. In including this with the latter, Professor De Visscher remarks that the compilers have been guilty of an "illogisme bizarre" (*La Condictio*, p. 81).

VIII. The title **13. 3**, *De condictione triticaria*, indicates a distinction in the form of the *condictio* according as it was brought to recover money or things other than money. Professor Buckland states that the name is certainly post-classical (*Text-book*, p. 683). It does not appear to have been in general use.

C. triticaria is the appropriate action when things other than money are claimed (1 pr.). It may be employed to claim land or a usufruct or a servitude (*ib.*). No one can claim what is his own property by this action except when it has been stolen or taken by force (1. 1). It will lie to recover land if the owner has been ejected by force or to recover the possession by a possessor similarly ejected (2). Rules as to time and place for valuation of the subject-matter of the claim (3; 4).

A special interest attaches to the titles of the Digest relating to the *condictio* in that they furnish the main source of those principles of quasi-contractual obligation which define the

conditions in which restitution may be obtained on the ground of unjust enrichment. These principles have been inherited more or less completely by the legal systems of most of the states of Continental Europe. They appear in the French Code Civil with some modifications in detail.[1] The German Civil Code appears to have retained the main features of the *Condictio*.[2] But indirectly they have been a potent influence in the development of the English Law of quasi-contract also. It is difficult to avoid the conclusion that Lord Mansfield's classical judgment in *Moses* v. *Macferlan* (1760) was not inspired by a careful perusal of the titles of the Digest which are included in this volume.[3]

[1] Planiol, II, §§ 835–61. By a modern development in French jurisprudence an action termed *in rem verso* (which, however, bears no relation to the Roman action of that name) is employed as a remedy for cases of unjustifiable enrichment and the equitable principle has been extended far beyond the limits contemplated by the Roman jurists. See *Cambridge Law Review*, V, p. 204, "The Doctrine of Unjustified Enrichment", by H C Gutteridge and R J. A. David.

[2] BGB. §§ 812–18. Schuster, pp 350–5

[3] "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund. It does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to the laws made for the protection of persons under those circumstances" (Burrow's *Reports*, p 1012), and see Winfield, *Province of the Law of Tort*, pp. 127 *et seq.*

I. DE REBUS CREDITIS SI CERTUM PETETUR ET DE CONDICTIONE

D. 12. 1

1. Ulpianus libro vicensimo sexto ad edictum. E re est, priusquam ad verborum interpretationem perveniamus, pauca de significatione ipsius tituli referre. (1) Quoniam igitur multa ad contractus varios pertinentia iura sub hoc titulo praetor inseruit, ideo rerum creditarum titulum praemisit: omnes enim contractus, quos alienam fidem secuti instituimus, conplectitur: nam, ut libro primo quaestionum Celsus ait, credendi generalis appellatio est: ideo sub hoc titulo practor et de commodato et de pignore edixit. nam cuicumque rei adsentiamur alienam fidem secuti mox recepturi quid, ex hoc contractu credere dicimur. rei quoque verbum ut generale praetor elegit.

Concerning things given on credit where the claim is for a thing certain and concerning the *condictio*.

1. Ulpianus (on the Edict, 26). It is appropriate, before we come to the explanation of the text, to say a few words about the meaning of the title[1] itself. (1) Since, therefore, the Praetor has inserted under this title[1] rules relating to contracts of various kinds, he has placed first the rubric of "things given on credit", for it includes all the contracts which we make relying on the good faith of others;[2] for, as Celsus says in the first book of his *Quaestiones*, the term *credere* (to give on credit) is general in its application: so that under this heading the Praetor has dealt with *commodatum* (loan for use) and *pignus* (pledge).[3]

[1] I.e. of the Edict.

[2] All contracts involve reliance on the good faith of another person; but the phrase "alienam fidem sequi" here particularly refers to those contracts in which a person transfers property to another, i.e. involving a *datio*, in consideration of an obligation on his part, voluntary or imposed by law, to give or do something or to abstain from doing something. See Savigny, *Röm. Recht*, § 219.

[3] Ulpian does not mean that these topics were included under "De Rebus Creditis" in the Edict merely because they involve dependence on another's good faith in that he is entrusted with the *possession* of a thing. This would not agree with what is stated before, viz. that the trust implied by *creditum* involves

2. PAULUS libro vicensimo octavo ad edictum. Mutuum *damus recepturi non eandem speciem quam* dedimus (alioquin commodatum erit aut depositum), sed idem genus: nam si aliud genus, veluti ut pro tritico vinum recipiamus, non erit mutuum. (1) Mutui datio consistit in his rebus, quae pondere numero mensura consistunt, quoniam eorum datione possumus in creditum ire, quia in genere suo functionem recipiunt per solutionem quam specie: nam in ceteris rebus ideo in creditum ire non possumus, quia aliud pro alio invito creditori solvi non potest. (2) Appellata est autem mutui datio ab eo, quod de

For whenever we agree to anything relying on another's good faith and are afterwards to receive something, we are said under this contract to give credit (*credere*). The Praetor also employed the word *res* (thing) as being of general application.[1]

2. Paulus (on the Edict, 28). We give a *mutuum* when we are to receive back, not the identical thing which we have given (otherwise it will be a *commodatum* or a *depositum*), but an equivalent of the same kind: for, if we are to receive back some other kind of thing, as, for instance, wine for wheat, the transaction will not be *mutuum*.[2] (1) The giving by way of *mutuum* is confined to those things which are determinable by weight, number or measure; since by the giving of such things we can create a credit,[3] seeing that they admit of discharge being made by payment of things of the same kind rather than by return of the identical thing; for in respect of other things we cannot create a credit, because payment cannot be made to a creditor without his consent by giving one thing for another of a different kind. (2) *Mutuum* is so called from the circum-

parting with the property in a thing. If the borrower or pledgee does not deny our ownership of the thing lent or pledged, the proper action is *commodati* or *pigneraticia*, as the case may be. But if he wrongfully assumes the rights of the owner, by consuming or alienating the thing, we can bring a *condictio*, as an alternative to the *bonae fidei* action. The *commodatum* or *pignus* may be regarded as being converted into a *creditum*, and a *condictio* will lie. Cf. h.t. 4. 1.

[1] It has been asserted that much of this extract is due to interpolations. But a recently discovered papyrus of the fourth century (Pap. Ryl. III, 474) reproduces the latter part of it, from "praetor et commodato", and we are allowed, by kind permission of the editors, to say that this will show that, apart from one corrupt line, the text is the same as that of the Digest. This does not prove that there is no interpolation, but if there is, the interpolation is very early.

[2] It will be exchange (*permutatio*), an innominate contract.

[3] *Creditum* here is used in a restricted sense, viz. that there is the expectation of a return *in genere*.

meo tuum fit: et ideo, si non fiat tuum, non nascitur obligatio. (3) Creditum ergo a mutuo differt qua genus a specie: nam creditum consistit extra eas res, quae pondere numero mensura continentur sic, ut, si eandem rem recepturi sumus, creditum est. item mutuum non potest esse, nisi proficiscatur pecunia, creditum autem interdum etiam si nihil proficiscatur, veluti si post nuptias dos promittatur. (4) In mutui datione oportet dominum esse dantem, nec obest, quod filius familias et servus dantes peculiares nummos obligant: id enim tale est, quale si voluntate mea tu des pecuniam: nam mihi actio adquiritur, licet mei nummi non fuerint. (5) Verbis quoque credimus quodam actu ad obligationem comparandam interposito, veluti stipulatione.

3. POMPONIUS libro vicensimo septimo ad Sabinum. Cum quid mutuum dederimus, etsi non cavimus, ut aeque bonum

stance that a thing becomes yours instead of remaining mine (*ex meo tuum*); and, therefore, if it is not made your property, the obligation does not arise. (3) Consequently *creditum* differs from *mutuum* in the same way as a genus differs from a species; for *creditum* may arise in respect of things other than those which are determined by weight, number or measure, insomuch that it is a *creditum* if we are to receive back the same thing. Again, there can be no *mutuum* unless the money is handed over, but there is sometimes a *creditum* even though nothing is parted with, as, for instance, if a *dos* is promised after marriage.[1] (4) When a *mutuum* is given, the donor ought to be owner; and it is not inconsistent with this that a *filiusfamilias* and a slave, by giving money which is part of their *peculium*, create a valid obligation: this indeed is the same thing as if you hand over money at my request, for the right of action is acquired for me although the money was not mine.[2] (5) We can also constitute a *creditum* by verbal contract, some formal act, such as a stipulation, being employed to create the obligation.[3]

3. Pomponius (on Sabinus, 27). When we have given anything as a *mutuum*, even though we have not provided that an

[1] *Creditum* here is used in a wider sense than in the preceding passages, viz. an obligation which is merely based on another's promise and not on a transfer of ownership.

[2] The agent is regarded as making it mine when he lends it on my account.

[3] A stipulation for a sum certain would be enforced by the *actio certae pecuniae creditae* (*condictio certi*), but the obligation is not *mutuum*.

nobis redderetur, non licet debitori deteriorem rem, quae ex eodem genere sit, reddere, veluti vinum novum pro vetere: nam in contrahendo quod agitur pro cauto habendum est, id autem agi intellegitur, ut eiusdem generis et eadem bonitate solvatur, qua datum sit.

4. ULPIANUS libro trigensimo quarto ad Sabinum. Si quis nec causam nec propositum faenerandi habuerit et tu empturus praedia desideraveris mutuam pecuniam nec volueris creditae nomine antequam emisses suscipere atque ita creditor, quia necessitatem forte proficiscendi habebat, deposuerit apud te hanc eandem pecuniam, ut, si emisses, crediti nomine obligatus esses, hoc depositum periculo est eius qui suscepit. nam et qui rem vendendam acceperit, ut pretio utcretur, periculo suo rem habebit. (1) Res pignori data pecunia soluta condici potest. et fructus ex iniusta causa percepti condicendi sunt: nam et si colonus post lustrum completum fructus perceperit, condici eos constat ita demum, si non ex voluntate

article of equally good quality is to be returned to us, the debtor is not allowed to return an inferior article of the same kind, as, for instance, new wine for old: for, in contracting, the intention of the parties is considered as if it were expressed, and in this case the intention is understood to be that what is paid shall be of the same kind and of the same quality as that which has been given.

4. Ulpianus (on Sabinus, 34). If a person had neither reason nor intention to lend money at interest, and you, being about to purchase lands, desired to borrow money but were not willing to raise money by way of a loan until you had made the purchase; whereupon the proposed lender, being, let us suppose, under a necessity to go on a journey, deposited the said money with you, on the understanding that, if you made the purchase, you should be bound as on a credit, this deposit is at the risk of the person who receives the money.[1] For so also will anyone who has received a thing to sell, in order that he may have the use of the purchase money, hold it at his own risk. (1) A *condictio* can be brought to recover a thing given in pledge when

[1] Before the purchase is made, the depositary will be liable for *culpa* as the deposit is for his benefit, but not for *casus*, as the ownership of the money is still in the lender. After the purchase, the transaction becomes a *mutuum*, and all risks pass to the borrower.

domini percepti sunt: nam si ex voluntate, procul dubio cessat condictio. (2) Ea, quae vi fluminum importata sunt, condici possunt.

5. POMPONIUS libro vicensimo secundo ad Sabinum. Quod te mihi dare oporteat si id postea perierit, quam per te factum erit quominus id mihi dares, tuum fore id detrimentum constat. sed cum quaeratur, an per te factum sit, animadverti debebit, non solum in potestate tua fuerit id nec ne aut dolo malo feceris quominus esset vel fuerit nec ne, sed etiam si aliqua iusta causa sit, propter quam intellegere deberes te dare oportere.

6. PAULUS libro vicensimo octavo ad edictum. Certum est, cuius species vel quantitas, quae in obligatione versatur, aut

the debt has been discharged.[1] Fruits also taken without lawful title are to be recovered by *condictio*:[2] for even if a tenant gather fruits after the expiration of his term, it is settled that a *condictio* will lie for them, always assuming that they were not taken with the landlord's consent; for if they were taken with his consent, beyond all doubt a *condictio* does not lie. (2) Things which have been carried on to another person's land by the force of streams can be claimed by *condictio*.[3]

5. Pomponius (on Sabinus, 22). If a thing which you are under a legal obligation to transfer to me is destroyed after you have done something which has rendered it impossible for you to make transfer, it is settled law that the loss falls on you. But when it is a question whether the failure to transfer is due to your act, it will be necessary to consider, not only whether transfer was within your power or not or whether or not you intentionally brought it about that it should be out of your power, but also whether there was any reasonable ground rendering it incumbent on you to know that you are under a legal duty to make the transfer.[4]

6. Paulus (on the Edict, 28). A thing is certain, when the individual thing or the quantity which is the subject-matter of

[1] Pernice (Labeo, p. 229) explains this as an extension of the *condictio* to a claim for possession, akin to the *furtiva*. For a different view see De V. pp. 75 *et seq.* The passage is suspected of interpolation and may have referred to the *fiducia*. Savigny, *Röm. Recht*, App. XIV, §§ 6, 7.

[2] The *condictio* will be *sine causa* or, if there has been a *contrectatio fraudulosa, furtiva*.

[3] Cf. D. 41. 1. 7. 2.

[4] *sed cum quaeratur*. This addition, introducing a subjective test of liability, may be an interpolation due to the compilers.

nomine suo aut ea demonstratione quae nominis vice fungitur qualis quantaque sit ostenditur. nam et Pedius libro primo de stipulationibus nihil referre ait, proprio nomine res appelletur an digito ostendatur an vocabulis quibusdam demonstretur: quatenus mutua vice fungantur, quae tantundem praestent.

7. ULPIANUS libro vicensimo sexto ad edictum. Omnia, quae inseri stipulationibus possunt, eadem possunt etiam numerationi pecuniae, et ideo et condiciones.

8. POMPONIUS libro sexto ex Plautio. Proinde mutui datio interdum pendet, ut ex post facto confirmetur: veluti si dem tibi mutuos nummos, ut, si condicio aliqua exstiterit, tui fiant sisque mihi obligatus: item si legatam pecuniam heres credi-

an obligation is designated by its name, or by such a description as is equivalent to a name, and its nature or quantity is thereby ascertained.[1] For Pedius,[2] in his first book "Concerning Stipulations", says that it is immaterial whether a thing is called by its proper name or pointed out with the finger or described by certain words, inasmuch as methods which are equivalent in effect may serve in place of one another.

7. Ulpianus (on the Edict, 26). Every provision which can be inserted in stipulations may also be introduced in an agreement for an advance of money, and therefore so also may conditions.

8. Pomponius (Extracts from Plautius, 6). Accordingly the giving of a loan by way of *mutuum* is sometimes in suspense, so that it may depend for its confirmation on something happening subsequently; as, for instance, if I give you money I have to lend, on the understanding that if some condition shall be satisfied it shall be yours and you shall be under an obligation to repay me. Likewise, if an heir lends money which is the subject of a legacy, and afterwards the legatee refuses to take the legacy, seeing that the money is considered to have been the property of the heir from the day of his entry on the inheritance he can sue for money lent.[3] For Julian says that even where delivery of property has been made by the heir, it is to

[1] Cf. D. 45. 1. 74 and 75.

[2] *Pedius.* See Roby, *Introduction to Digest*, p. cliv.

[3] In the classical period this would apply only to the case of a legacy *per vindicationem* or *per praeceptionem*. Until the legatee accepts or refuses the *mutuum* is in suspense. If he accepts there is no *mutuum* as the money does not belong to the heir; if he refuses, the *mutuum* is good from the outset, as the heir's title then relates back to *aditio*.

derit, deinde legatarius eam noluit ad se pertinere, quia heredis ex die aditae hereditatis videntur nummi fuisse, ut credita pecunia peti possit. nam Iulianus ait et traditiones ab herede factas ad id tempus redigi, quo hereditas adita fuerit, cum repudiatum sit legatum aut adpositum.[1]

9. ULPIANUS libro vicensimo sexto ad edictum. Certi condictio competit ex omni causa, ex omni obligatione, ex qua certum petitur, sive ex certo contractu petatur sive ex incerto: licet enim nobis ex omni contractu certum condicere, dummodo praesens sit obligatio: ceterum si in diem sit vel sub condicione obligatio, ante diem vel condicionem non potero agere. (1) Competit haec actio etiam ex legati causa et ex lege Aquilia. sed et

be referred to the time at which entry was made on the inheritance when the legacy or allotted share[1] has been refused.

9. Ulpianus (on the Edict, 26). A *condictio certi* is available on every ground of claim and on every obligation where recovery of something certain is sought, whether the claim be based on a contract of certain or uncertain description:[2] for it is open to us to bring a *condictio certi* on any kind of contract, provided only there is a present obligation: but if the obligation is to arise at a future day or is subject to a condition, I cannot bring an action before the day arrives or the condition is fulfilled. (1) This action is available also in a claim based on a legacy or on the Lex Aquilia.[3] Moreover a claim on the ground of theft may be enforced by means of this action. This action is available also when proceedings are taken under a *senatusconsultum*; when, for instance, a person to whom an

[1] *adpositum*. Cf. D. 28. 5. 17 pr., where an heir to a part is spoken of as "cui pars adposita est". Cujas would read *acquisitum* for *adpositum*. Other suggestions are *agnitum* (Baron), *admissum* (Blume).

[2] The text of Ulpian has been considerably modified by interpolation to correspond with the practice in the time of Justinian, under which the *condictio* might be used as an alternative in most, if not all, actions *in personam*, when the plaintiff chose to claim a *certum* at the risk of incurring the penalties of *plus petitio* if the claim proved excessive. There have been various suggestions as to the original tenor of the extract. See De V. pp. 71–2; Girard, p. 650, n. 3.

[3] *ex lege Aquilia*. A *condictio* might be brought as an alternative to the Aquilian action in cases where the wrongdoer had been unjustly enriched for the amount of the unjust enrichment, i.e. to the extent to which the Aquilian action would survive against the heirs, the obligation being quasi-contractual, e.g. where *A* had negligently converted *B*'s property. Cf. *Phillips v. Homfray* (1892) 1 Ch. 465. The use of this alternative bears a strong analogy to the practice in English Law of "waiving the tort" and suing on a quasi-contract.

ex causa furtiva per hanc actionem condicitur. sed et si ex senatus consulto agetur, competit haec actio, veluti si is cui fiduciaria hereditas restituta est agere volet. (2) Sive autem suo nomine quis obligatus sit sive alieno, per hanc actionem recte convenitur. (3) Quoniam igitur ex omnibus contractibus haec certi condictio competit, sive re fuerit contractus factus sive verbis sive coniunctim, referendae sunt nobis quaedam species, quae dignum habent tractatum, an haec actio ad petitionem eorum sufficiat. (4) Numeravi tibi decem et haec alii stipulatus sum: nulla est stipulatio: an condicere decem per hanc actionem possim, quasi duobus contractibus intervenientibus, uno qui re factus est, id est numeratione, alio qui verbis, id est inutiliter, quoniam alii stipulari non potui? et puto posse. (5) Idem erit, si a pupillo fuero sine tutoris auctoritate stipulatus, cui tutore

inheritance has been transferred under a *fideicommissum* wishes to sue.[1] (2) Whether a person has contracted an obligation on his own behalf or on behalf of another, he may properly be sued in this form of action. (3) Since, therefore, this *condictio certi* is available on contracts of every kind, whether the contract has been made *re* or *verbis* or by a combination of both forms,[2] certain specific transactions call for our attention as to which it is worthy of consideration whether this action furnishes an adequate means of enforcing them. (4) (For instance) I have paid to you ten (*aurei*) and stipulated for their repayment to another person; the stipulation is void:[3] can I by this action (*condictio certi*) claim return of the ten (*aurei*) on the ground that there were two contracts, one made *re*, i.e. by the payment of the money, the other *verbis*, consequently of no effect, seeing that I could not stipulate on behalf of another person? My opinion is that I can do so.[4] (5) The same rule will apply if I have obtained a promise by stipulation from a *pupillus* without the authorisation of his tutor, having already advanced money

[1] The *Sc. Trebellianum*, the text of which is given in D. 36. 1. 1. 1, enabled the *fideicommissarius* to sue and be sued, as if he were the heir, in respect of the inheritance or the portion thereof transferred under a *fideicommissum*. The text suggests that wherever the *fideicommissarius* has an action under the *Sc.* he can bring a *condictio* as an alternative. This represents the law in Justinian's day, but was not so in the classical period.

[2] *coniunctim*, i.e. where there is both a real and a verbal obligation. The notion of an obligation *re et verbis* is a late development. See B. p. 463, n. 5.

[3] See G. III. 103; J. Inst. III. 19. 4.

[4] If the *stipulation* had been binding there would have been a novation (D. 45. 1. 126. 2; 46. 2. 1. 1). But here the stipulation is void; hence there is no novation and the obligation arising from the payment of the money (*re*) remains effective.

auctore credidi: nam et tunc manebit mihi condictio ex numeratione. (6) Item quaeri potest et si, quod tibi numeravi, sub impossibili condicione stipuler: cum enim nulla sit stipulatio, manebit condictio. (7) Sed et si ei numeravero, cui postea bonis interdictum est, mox ab eo stipuler, puto pupillo eum conparandum, quoniam et stipulando sibi adquirit. (8) Si nummos meos tuo nomine dedero velut tuos absente te et ignorante, Aristo scribit adquiri tibi condictionem: Iulianus quoque de hoc interrogatus libro decimo scribit veram esse Aristonis sententiam nec dubitari, quin, si meam pecuniam tuo nomine voluntate tua dedero, tibi adquiritur obligatio, cum cottidie crediturі pecuniam mutuam ab alio poscamus, ut nostro nomine creditor numeret futuro debitori nostro. (9) Deposui apud te decem, postea permisi tibi uti: Nerva Proculus

to him with such authorisation: for then also I shall continue to have a *condictio* in respect of the payment. (6) Likewise the question may be raised if I stipulate under some impossible condition for the return of money which I have paid to you: for although the stipulation is void,[1] the *condictio* for the return of the money will continue available. (7) Again, if I pay money to a person who is subsequently interdicted from the management of his property and thereupon stipulate with him for repayment, it seems to me that the case is parallel to that of the *pupillus*, since the latter also acquires rights for himself by stipulation.[2] (8) If I pay money of my own on your behalf as if it were yours, you being at the time absent and unaware of the payment, Aristo writes that the *condictio* is acquired for you;[3] Julian also, having been consulted about this, writes in his tenth book that Aristo's opinion is correct; and that there is no doubt that if I advance my own money on your behalf with your consent, the rights under the obligation are acquired for you, seeing that it is an everyday occurrence that when we are going to lend money we ask some other person to advance on our credit the money to the person who is about to become our debtor.[4] (9) I deposited with you ten (*aurei*) and afterwards

[1] See J. Inst. III. 19. 11.

[2] The pupil can stipulate, although he cannot make a binding promise: and, likewise, the *prodigus* is interdicted from incurring liability but not from obtaining benefit. The obligation *re* stands good, although a void stipulation is superadded to the *real* obligation. Cf. D. 46. 2. 3.

[3] Provided, of course, you ratify the transaction when it is brought to your knowledge.

[4] It was a common practice for bankers (*argentarii*) to do this for their customers.

etiam antequam moveantur, condicere quasi mutua tibi haec posse aiunt, et est verum, ut et Marcello videtur: animo enim coepit possidere. ergo transit periculum ad eum, qui mutuam rogavit, et poterit ei condici.

10. IDEM libro secundo ad edictum. Quod si ab initio, cum deponerem, uti tibi si voles permisero, creditam non esse antequam mota sit, quoniam debitu iri non est certum.

11. IDEM libro vicensimo sexto ad edictum. Rogasti me, ut tibi pecuniam crederem: ego cum non haberem, lancem tibi dedi vel massam auri, ut eam venderes et nummis utereris. si vendideris, puto mutuam pecuniam factam. quod si lancem vel massam sine tua culpa perdideris prius quam venderes, utrum mihi an tibi perierit, quaestionis est. mihi videtur Nervae distinctio verissima existimantis multum interesse, venalem

gave you permission to use the money; Nerva and Proculus say that even before you deal with the money I can bring a *condictio* for it against you as on a loan, and this is correct, as was also the opinion of Marcellus; for you have become possessor by virtue of your intention.[1] Consequently the risk passes to the person who asked for the loan, and a *condictio* will lie against him.

10. The same (on the Edict, 2). If, on the other hand, I gave you permission at the beginning, when I deposited the money with you, to make use of it if you so desired, there is no loan until the money is dealt with, as until then it is not certain that a debt will be contracted.[2]

11. The same (on the Edict, 26). You have requested me to lend you money. Not having any available, I have handed you a dish or an ingot of gold so that you might sell it and use the proceeds. If you have sold it, I think a loan of the money has been constituted. But if, before a sale was effected, you have, without fault on your part, lost the dish or the gold, a question arises as to whether the loss falls on me or on you. It seems to me that a distinction made by Nerva is most sound, it being his view that it makes a great difference whether or not I was offering this dish or gold for sale; for if I was offering it for sale, the loss falls on me, in the same way as if I had handed

[1] An instance of *traditio brevi manu*. You already have *detentio*, and the change of *animus*, the permission to use, operates to confer on you possession, and, in this case, ownership.

[2] In this case the dealing with the money is the test of the change of *animus*.

habui hanc lancem vel massam nec ne, ut, si venalem habui, mihi perierit, quemadmodum si alii dedissem vendendam: quod si non fui proposito hoc ut venderem, sed haec causa fuit vendendi, ut tu utereris, tibi eam perisse, et maxime si sine usuris credidi. (1) Si tibi dedero decem sic, ut novem debeas, Proculus ait, et recte, non amplius te ipso iure debere quam novem. sed si dedero, ut undecim debeas, putat Proculus amplius quam decem condici non posse. (2) Si fugitivus servus

it to some one else to be sold: but if I had no intention to sell it and the purpose of the sale was that you might have the use of the proceeds, the loss falls on you, especially if I have lent it to you without charging interest.[1] (1) If I have advanced you ten (*aurei*) on the understanding that you are to be in my debt for nine, Proculus says, and rightly, that in strict law you owe me no more than nine. But if I have made the advance on the understanding that you are to be my debtor for eleven, Proculus holds that not more than ten can be recovered by *condictio*.[2] (2) If a fugitive slave has lent you money, the question arises as to whether the owner of the slave can bring a *condictio* to recover it from you. If indeed my slave, being one to whom the

[1] Nerva appears to mean that the question of the incidence of loss depends on whether the immediate object of the delivery of the dish or ingot was to raise money for the loan to you or the immediate object was to effect a sale, and on that being accomplished, the proceeds to be retained on loan. In the former case, supposing the article is lost before a sale can be effected, the loss would be on you, the arrangement being solely for your benefit; in the latter the loss would fall on me, in the absence of *culpa* on your part, as it is *mandatum* until the proceeds of sale are received by you. The transaction might, in the latter case, be in the nature of *aestimatum*, in which case the principles applicable to the risk of loss are to be found in D. 19. 5. 17. 1. See also D. 19. 5. 19. Cf. D. 17. 1. 34 (Africanus), which is supposed to be at variance with Ulpian's view in this extract. But the case put by Africanus seems to involve the important difference that his agent was to sell the article, and if he succeeded, was *promised* a loan; he ought therefore to have delivered the money to his principal, and then received re-delivery; here, however, by agreement of the parties the actual sale of the article is to constitute a delivery *brevi manu* of the proceeds of its sale.

[2] Cf. D. 2. 14. 17 pr., where the reason is given: "Si tibi decem dem et paciscar ut viginti mihi debeantur, non nasci obligatio ultra decem, re enim non potest obligatio contrahi, nisi quatenus datum sit." A pact annexed to a contract *re* might vary the obligation (see B. p. 528) but not so as to increase the amount to be repaid, for this would be to provide for the payment of interest, which could only be effected by a stipulation. But a pact to the advantage of the debtor may be pleaded by way of *exceptio*, so that a creditor who has agreed to take nine will fail if he claims ten. See also D. 2. 14. 4. 3 and h.t. 40 (the well-known *Lecta*).

nummos tibi crediderit, an condicere tibi dominus possit, quaeritur. et quidem si servus meus, cui concessa est peculii administratio, crediderit tibi, erit mutua: fugitivus autem vel alius servus contra voluntatem domini credendo non facit accipientis. quid ergo? vindicari nummi possunt, si extant, aut, si dolo malo desinant possideri, ad exhibendum agi: quod si sine dolo malo consumpsisti, condicere tibi potero.

12. POMPONIUS libro sexto ex Plautio. Si a furioso, cum eum compotem mentis esse putares, pecuniam quasi mutuam acceperis eaque in rem tuam versa fuerit, condictionem furioso adquiri Iulianus ait: nam ex quibus causis ignorantibus nobis actiones adquiruntur, ex isdem etiam furioso adquiri. item si is qui servo crediderat furere coeperit, deinde servus in rem domini id verterit, condici furiosi nomine posse. et si alienam pecuniam credendi causa quis dederit, deinde furere

management of his *peculium* has been granted, has lent you money, there will be a valid *mutuum*: but a fugitive slave, or indeed any other slave,[1] when he lends against the will of his owner, does not make the money the property of the person receiving it.[2] What follows then? The coins, if they are traceable, may be recovered by *vindicatio*, or, if they have been parted with fraudulently, an action *ad exhibendum* will lie: if, however, you have spent them without fraudulent intent, I can bring a *condictio* against you.

12. Pomponius (Extracts from Plautius, 6). If you have accepted money by way of loan from a lunatic,[3] thinking him to be of sound mind, and the money has been employed in your business, Julian says that the right to a *condictio* is acquired for the lunatic: for in all those cases in which rights of action are acquired for us without our knowledge, such rights of action may be acquired equally for a lunatic. Likewise, if anyone who had lent money to a slave subsequently became a lunatic and then the slave expended the money in his owner's business, a *condictio* may be brought on behalf of the lunatic. Again, if anyone has advanced money belonging to another person by

[1] *alius*, i.e. who has not free administration of his *peculium*.

[2] A fugitive slave does not retain the power of administration of his *peculium* (D. 15. 1. 48 pr.).

[3] As there can be no real assent by a lunatic, there is no *mutuum* but the obligation is quasi-contractual. Until the money has been expended there is a *vindicatio*. After it is spent by you, you will be liable to a *condictio* to the extent of your enrichment.

coeperit et consumpta sit ea pecunia, condictionem furioso adquiri.

13. ULPIANUS libro vicensimo sexto ad edictum. Nam et si fur nummos tibi credendi animo dedit, accipientis non facit, sed consumptis eis nascitur condictio. (1) Unde Papinianus libro octavo quaestionum ait: si alienos nummos tibi mutuos dedi, non ante mihi teneris, quam eos consumpseris. quod si per partes eos consumpseris, an per partes tibi condicam, quaerit: et ait condicturum, si admonitus alienos nummos fuisse ideo per partem condico, quia nondum totos consumptos compereram. (2) Si servus communis decem crediderit, puto, sive administratio servo concessa est, sive non et consumantur nummi, quinum competere actionem: nam et si communes tibi

way of loan, and then becomes lunatic, and the money has been spent, the right to bring a *condictio* is acquired for the lunatic.[1]

13. *Ulpianus (on the Edict, 26). Furthermore, if a thief has* given you money with the intention of making a loan, he does not make you the owner of the money, but if the money is spent a *condictio* arises.[2] (1) Hence Papinian, in the eighth book of his *Quaestiones*, says: "if I have lent you money belonging to another, you are not liable to an action at my suit until you have spent it."[3] He then goes on to raise the question whether, if you have spent the money bit by bit, I can bring a *condictio* against you for separate portions, and says that I can do so if I have been informed that the money was another's and my reason for bringing the *condictio* for a portion is that I had not discovered that the whole was spent.[4] (2) If a slave owned in common has lent ten (*aurei*), my opinion is that, whether the slave has been granted free administration of his *peculium* or not, if the money has been spent, an action for five lies on the part of each co-owner; for Papinian informs us, in the eighth book of his *Quaestiones*, that if I lend you a hundred coins held in

[1] There is not much point in these two cases, as, in the first, there is a *mutuum* from the beginning, and in the second, the money having been expended, there would be a *condictio* apart from the question of insanity.

[2] I.e. can be brought *by the thief*.

[3] Until the money is spent, the owner has a *vindicatio*. After the money is spent, I am liable to a *condictio* at the suit of the owner and, consequently, you are similarly liable to me.

[4] My action is for the portion which has been spent and by which you have been enriched. The part remaining unconsumed can be recovered by *vindicatio* by the true owner and is not regarded as a *mutuum*, the property therein not having passed.

nummos credidero centum, posse me quinquaginta condicere libro octavo quaestionum Papinianus scribit, etiamsi singula corpora communia fuerint.

14. IDEM libro vicensimo nono ad edictum. Si filius familias contra senatus consultum mutuatus pecuniam solverit, patri nummos vindicanti nulla exceptio obicietur: sed si fuerint consumpti a creditore nummi, Marcellus ait cessare condictionem, quoniam totiens condictio datur, quotiens ex ea causa numerati sunt, ex qua actio esse potuisset, si dominium ad accipientem transisset: in proposito autem non esset. denique per errorem soluti contra senatus consultum crediti magis est cessare repetitionem.

common ownership, I may bring a *condictio* for fifty, although each individual coin was common property.[1]

14. The same (on the Edict, 29). If a *filiusfamilias*, having borrowed money in contravention of the *senatusconsultum*,[2] has repaid it, no *exceptio* will operate as a bar to the claim if the *paterfamilias* brings a *vindicatio* for the coins; but if the coins have been spent by the creditor, Marcellus says that a *condictio* will not lie, seeing that a *condictio* is granted only in cases where money has been paid over in circumstances which would have given rise to an action if the property in the coins had passed to the receiver:[3] but this would not be so in the case under consideration. Moreover, it is the better opinion that where money has been lent in contravention of the *senatusconsultum* and has been repaid by mistake, there is no action to recover such payment.

[1] Though originally I am part owner of every coin, as money is a *res fungibilis*, I have only a right to claim half in quantity, instead of half in each coin.

[2] I.e. the *Sc. Macedonianum*. See D. 14. 6 and B. pp. 465–6.

[3] *ex qua actio esse potuisset. actio = condictio.* It is stated that the *pater* can bring a *vindicatio* for the money if not consumed, but that a *condictio* will not lie when the money has been spent. The explanation is that the *filiusfamilias* is bound by a natural obligation and although he cannot pass the ownership in the money so as to bar the *pater's vindicatio*, when the money has been consumed in good faith, the obligation arising thereby being in its nature equitable, a claim for repayment when the debt has been repaid may be met by the *exceptio* based on the natural obligation. The creditor is, of course, supposed to be in good faith, that is to be under the impression that the debt has been repaid with the *pater's* consent, or with money *extra patrimonium patris*. D. 14. 6. 9. 1, which is apparently inconsistent with this passage, may be reconciled with it on this assumption.

15. IDEM libro trigensimo primo ad edictum. Singularia quaedam recepta sunt circa pecuniam creditam. nam si tibi debitorem meum iussero dare pecuniam, obligaris mihi, quamvis meos nummos non acceperis. quod igitur in duabus personis recipitur, hoc et in eadem persona recipiendum est, ut, cum ex causa mandati pecuniam mihi debeas et convenerit, ut crediti nomine eam retineas, videatur mihi data pecunia et a me ad te profecta.

16. PAULUS libro trigensimo secundo ad edictum. Si socius propriam pecuniam mutuam dedit, omnimodo creditam pecuniam facit, licet ceteri dissenserint: quod si communem numeravit, non alias creditam efficit, nisi ceteri quoque consentiant, quia suae partis tantum alienationem habuit.

17. ULPIANUS libro primo disputationum. Cum filius

15. The same (on the Edict, 31). Some peculiar rules have been established in relation to loans of money. For if I have given an order to my debtor to give you money, you are liable to me, although you have not received coins belonging to me. This rule, then, which is admitted in the case of two persons, must be applied where the person is one and the same, so that when you owe me money on the ground of *mandatum* and we have agreed that you are to retain it as a loan, the money is regarded as having been handed over to me and then transferred by me to you.[1]

16. Paulus (on the Edict, 32). If a partner has lent money of his own, he creates a valid money loan in any case, even though the other partners have refused to give their consent: but if he has advanced money that was owned in common, he does not make an effective loan unless the others also consent, because he has only power to transfer ownership of his own share.

17. Ulpianus (Disputationes, 1). When a *filiusfamilias*, who was living at Rome for the purpose of pursuing his studies, lent

[1] In D. 17. 1. 34 there is an excerpt from Africanus which appears to be inconsistent with what Ulpian says here. Voet explains this by suggesting that in the case discussed by Africanus the communication between the *mandator* and *mandatarius* was by letter, and that Ulpian here assumes an agreement *inter praesentes*. The question dealt with is not whether or not there is a binding agreement but whether the contract is a *mutuum*. In order that a *traditio brevi manu* may be presumed the parties must be in the presence of each other. This view is supported by D. 6. 1. 47, D. 18. 1. 74, D. 41. 2. 1. 21.

familias viaticum suum mutuum dederit, cum studiorum causa Romae ageret, responsum est a Scaevola extraordinario iudicio esse illi subveniendum.

18. IDEM libro septimo disputationum. Si ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Iulianus scribit donationem non esse: sed an mutua sit, videndum. et puto nec mutuam esse magisque nummos accipientis non fieri, cum alia opinione acceperit. quare si eos consumpserit licet condictione teneatur, tamen doli exceptione uti poterit, quia secundum voluntatem dantis nummi sunt consumpti. (1) Si ego quasi deponens tibi dedero, tu quasi mutuam accipias, nec depositum nec mutuum est: idem est et si tu quasi mutuam pecuniam dederis, ego quasi commodatam ostendendi gratia

money out of his travelling allowance, an opinion was given by Scaevola that he should obtain relief by means of proceedings *extra ordinem*.[1]

18. The same (Disputationes, 7). If I have handed over money to you intending to make a gift, and you accept it as a loan, Julian states that there is no valid gift. But whether there is a loan remains to be seen. My opinion is that neither is there a loan and that the better view is that the money does not become the property of the receiver, as he took the money under an erroneous impression.[2] Consequently, if he has spent the money, granted that he is liable (in strict law) if a *condictio* is brought, nevertheless he may plead the *exceptio doli*, in view of the fact that the money has been spent in accordance with the intention of the giver. (1) If I have handed over money to you intending a deposit thereof, and you receive it regarding it as a loan, the transaction is neither a deposit nor a loan; and the result is the same if you have handed over money to me intending a *mutuum* (loan for consumption) and I have received it as being a *commodatum* (loan for use) for the purpose of display; but in both of these cases, if the money has been

[1] He may also have an *utilis actio*. See D. 5. 1. 18. 1. Cf. D. 44. 7. 9 and 13.

[2] The text is suspected of interpolation. See B. p. 228, n. 7. There is an intention on the part of each that the property shall pass, so that the *traditio* passes the property and therefore the money cannot be recovered by *vindicatio*. The mistake vitiates the supposed *causa* and consequently technically a *condictio sine causa* could be brought, but it can be met by an *exceptio doli*.

accepi: sed in utroque casu consumptis nummis condictioni sine doli exceptione locus erit.

19. IULIANUS libro decimo digestorum. Non omnis numeratio eum qui accepit obligat, sed quoticns id ipsum agitur, ut confestim obligaretur. nam et is, qui mortis causa pecuniam donat, numerat pecuniam, sed non aliter obligabit accipientem, quam si exstitisset casus, in quem obligatio collata fuisset, veluti si donator convaluisset aut is qui accipiebat prior decessisset. et cum pecunia daretur, ut aliquid fieret, quamdiu in pendenti esset, an id futurum esset, cessabit obligatio: cum vero certum esse coepisset futurum id non esse, obligabitur qui accepisset: veluti si Titio decem dedero, ut Stichum intra calendas manumitteret, ante kalendas nullam actionem habebo, post kalendas ita demum agere potero, si manumissus non fuerit. (1) Si pupillus sine tutoris auctoritate crediderit aut solvendi causa

spent, a *condictio* will lie and the *exceptio doli* will not be available.[1]

19. Julianus (Digesta, 10). The handing over of money does not in every case put the receiver under an obligation; it does so only when the object of the transaction is that he should be bound at once. For the person who gives money by way of *donatio mortis causa* hands over the money, but will not put the person who receives it under an obligation unless the event happens on which the obligation was made to depend, as, for instance, if the donor has recovered from sickness or the donee has died first. Again, if money is given on the condition that something should be done, so long as it is uncertain whether it will be done or not, no obligation will exist; but when it has become certain that it will not be done, the person who received the money will be bound: for instance, if I have given Titius ten (*aurei*) on the understanding that he will manumit Stichus before the Kalends, then, before the Kalends I shall have no right of action, and after the Kalends I can bring an action only if Stichus has not been manumitted.[2] (1) If a *pupillus*, without the authority of his tutor, has lent money or has handed it over with the object of paying a debt, then, if the money has been spent, he has a *condictio*, or is released from the

[1] In these cases *detentio* alone arises and there is no transfer of possession, but, when the money is spent, a *condictio* will be available on the ground of unjustifiable enrichment.

[2] The *condictio* would be *causa data causa non secuta*, D. 12. 4. 8.

dederit, consumpta pecunia condictionem habet vel liberatur non alia ratione, quam quod facto eius intellegitur ad eum qui accepcrit pervenisse: quapropter si eandem pecuniam is, qui in creditum vel in solutum acceperat, alii porro in creditum vel in solutum dederit, consumpta ea et ipse pupillo obligatur vel eum a se liberabit et eum cui dederit obligatum habebit vel se ab eo liberabit. nam omnino qui alienam pecuniam credendi causa dat, consumpta ea habet obligatum eum qui acceperit: item qui in solutum dederit, liberabitur ab co qui acceperit.

20. IDEM libro octavo decimo digcstorum. Si tibi pecuniam donassem, ut tu mihi eandem crederes, an credita fieret? dixi in huiusmodi propositionibus non propriis verbis nos uti, nam talem contractum neque donationem esse neque pecuniam creditam: donationem non esse, quia non ea mente pecunia

debt, (as the case may be,) for no other reason than that by his act the money has come into the possession of the person who received it: hence, if the person who received the money on loan or in payment has again handed on the same money to someone else as a loan or in payment of a debt, then, after the money has been spent, the person first mentioned comes under an obligation to the *pupillus* or discharges him from liability, as the case may be, and will put the person to whom he transferred the money under an obligation to himself or will be discharged from his debt to the latter, according to the circumstances.[1] For in all cases he who hands over money belonging to another on loan puts the receiver under obligation when the money has been spent, and similarly he who gives money in payment of a debt is discharged from liability to the person who receives it.

20. The same (Digesta, 18). If I have made a gift of money to you with the purpose that you should lend the same money to me, would a loan be created? My answer was that in cases put in this form we were not employing appropriate terms, for such a contract is neither a gift nor a loan of money: it is not a gift, because the money was not given with the intention that it should remain at the disposal of the receiver in all events; it

[1] So long as the money is identifiable there is a *vindicatio* for its recovery (subject to an *exceptio* if the *pupillus* owed the debt). After it has been paid away and ceases to be traceable, the person who has received it remains liable to a *condictio* or the debt due to him is discharged, but he in turn has a *condictio* against the third person or will be freed from his debt to the third person, as the case may be.

daretur, ut omnimodo penes accipientem maneret: creditam non esse, quia exsolvendi causa magis daretur quam alterius obligandi. igitur si is, qui pecuniam hac condicione accepit, ut mihi in creditum daret, acceptam dederit, non fore creditam: magis enim meum accepisse intellegi debeo. sed haec intellegenda sunt propter suptilitatem verborum: benignius tamen est utrumque valere.

21. IDEM libro quadragensimo octavo digestorum. Quidam existimaverunt neque eum, qui decem peteret, cogendum quinque accipere et reliqua persequi, neque cum, qui fundum suum diceret, partem dumtaxat iudicio persequi: sed in utraque causa humanius facturus videtur praetor, si actorem compulerit ad accipiendum id quod offeratur, cum ad officium eius pertineat lites deminuere.

is not a loan, because it was handed over rather with the purpose of discharging a liability than of putting another under an obligation. Therefore if a person who has received money from me on the condition that he should lend it to me, has handed back to me the money so received, this will not be regarded as a loan; for I ought rather to be considered to have received what is my own property.[1] This construction, however, is what is to be drawn from the strict meaning of the words; it is, nevertheless, more in accordance with equity to regard both transactions as valid.

21. The same (Digesta, 48). Some authorities have been of opinion that neither a man who claims ten can be compelled to take five and sue for the balance, nor a man who claims an estate as being his property to take part thereof and pursue his action for a part only: but in both cases it seems that the Praetor would be adopting the more equitable course if he compels the plaintiff to accept what is offered, seeing that it is part of his duty to diminish litigation.[2]

[1] The reasoning here appears defective. The essence of the transaction is the creation of a debt by way of gift. The final sentence (which may be an interpolation) indicates that there would be a valid *mutuum* giving rise to a *condictio* (*actio certae pecuniae creditae*).

[2] The debtor may tender a smaller sum or quantity when the dispute is as to the amount but he cannot of course tender one thing for another of a different kind. Cf. D. 20. 6. 15; 46. 3. 50 and 99. If the creditor refuses an unconditional tender and the money or other tender is subsequently lost without fault of the debtor, the loss falls on the creditor. D. 46. 3. 72 pr.

22. IDEM libro quarto ex Minicio. Vinum, quod mutuum datum erat, per iudicem petitum est: quaesitum est, cuius temporis aestimatio fieret, utrum cum datum esset an cum litem contestatus fuisset an cum res iudicaretur. Sabinus respondit, si dictum esset quo tempore redderetur, quanti tunc fuisset, *si dictum non esset, quanti tunc fuisset* cum petitum esset. interrogavi, cuius loci pretium sequi oporteat. respondit, si convenisset, ut certo loco redderetur, quanti eo loco esset, si dictum non esset, quanti ubi esset petitum.

23. AFRICANUS libro secundo quaestionum. Si eum servum, qui tibi legatus sit, quasi mihi legatum possederim et vendiderim, mortuo eo posse te mihi pretium condicere Iulianus ait, quasi ex re tua locupletior factus sim.

22. The same (Extracts from Minicius, 4). An action was brought before a *iudex* for wine which had been the subject of a *mutuum*: the question arose as to the time at which its value should be computed, whether at the time it was handed over, or at the time of *litis contestatio*, or at the time when judgment was delivered. Sabinus gave the opinion that if the time when it was to be returned had been expressly stated, its value should be assessed at that date; if there was no time stated,[1] the value at the time when it was sued for should be taken. I asked what local price should be followed in making the valuation. He replied that if it had been agreed that the wine should be returned at some particular place, then the price at that place should be taken; if there was no such provision, the price at the place where the action was brought.[2]

23. Africanus (Quaestiones, 2). If a slave has been left to you as a legacy and I have taken possession of him and sold him as if he had been left as a legacy to me, Julian is of opinion that, in case of his death, you can bring a *condictio* against me for the purchase money on the ground that I have been enriched out of your property.[3]

[1] The words in italics are not found in the MSS, but it is clear that there has been an omission by the copyist.

[2] This excerpt should more appropriately be placed under D. 13. 3 (*De condictione triticaria*). This, and a number of similar displacements, indicate that the classification of *condictiones* is post-classical.

[3] While the slave lived you could have a *vindicatio*. On the death of the slave you have the *condictio* against me on the ground of unlawful enrichment. Cf. C. 4. 51. 1.

24. ULPIANUS libro singulari pandectarum. Si quis certum stipulatus fuerit, ex stipulatu actionem non habet, sed illa condicticia actione id persequi debet, per quam certum petitur.

25. IDEM libro singulari de officio consularium. Creditor, qui ob restitutionem aedificiorum crediderit, in pecuniam quam crediderit privilegium exigendi habebit.

26. IDEM libro quinto opinionum. Si pecuniam militis procurator eius mutuam dedit fideiussoremque accepit, exemplo eo quo si tutor pupilli aut curator iuvenis pecuniam alterutrius eorum creditam stipulatus fuerit, actionem dari militi cuius pecunia fuerit placuit.

27. IDEM libro decimo ad edictum. Civitas mutui datione obligari potest, si ad utilitatem eius pecuniae versae sunt: alioquin ipsi soli qui contraxerunt, non civitas, tenebuntur.

24. Ulpianus (Pandectae, Liber singularis). If a person has stipulated for a thing which is certain, he has not the action *ex stipulatu*, but should prosecute his claim by that form of *condictio* by which a thing certain is claimed.

25. The same (concerning the Office of persons of Consular Rank). A creditor who has lent money for the repair of buildings will have a preferential claim for repayment of the money which he has lent for that purpose.[1]

26. The same (Opiniones, 5). If the *procurator* of a soldier has lent the soldier's money and taken a surety for repayment, it is settled that, on the analogy of the case where a tutor of a *pupillus* or a curator of a minor has stipulated for repayment of the money of either of them which has been lent, a right of action is allowed to the soldier to whom the money belonged.[2]

27. The same (on the Edict, 10). A municipality may be bound by a loan of money, if the money has been employed for its benefit; otherwise the persons alone who made the contract, and not the municipality, will incur liability.[3]

[1] See D. 20. 2. 1.

[2] Because the money has been lent on the soldier's account, not merely because the money is his. If the money belonging to *A* was lent by *B* as if it were *B*'s, the *condictio* against the borrower must be brought by *B*. See C. 4. 2. 2 and 7. Cf. h.t. 13. 1.

[3] The municipality would necessarily act through agents and the agent who contracted would alone be liable on the contract of loan, but when the money is expended for the benefit of the municipality, the latter incurs a quasi-contractual or equitable obligation to repay enforceable by *condictio*.

28. GAIUS libro vicensimo primo ad edictum provinciale. Creditor, qui non idoneum pignus accepit, non amittit exactionem eius debiti quantitatis, in quam pignus non sufficit.

29. PAULUS libro quarto ad Plautium. Si institorem servum dominus habuerit, posse dici Iulianus ait etiam condici ei posse, quasi iussu eius contrahatur, a quo praepositus sit.

30. IDEM libro quinto ad Plautium. Qui pecuniam creditam accepturus spopondit creditori futuro, in potestate habet, ne accipiendo se ei obstringat.

31. IDEM libro septimo decimo ad Plautium. Cum fundus vel homo per condictionem petitus esset, puto hoc nos iure uti, ut post iudicium acceptum causa omnis restituenda sit, id est omne, quod habiturus esset actor, si litis contestandae tempore solutus fuisset. (1) Servum tuum imprudens a fure bona fide

28. Gaius (on the Provincial Edict, 21). A creditor who has taken an insufficient pledge does not lose the right to exact payment of so much of his debt as the pledge is insufficient to cover.

29. Paulus (on Plautius, 4). If a master has employed his slave as his business agent (*institor*), Julian says that it may be maintained that a *condictio* also can be brought against the master[1] on the ground that the contract is entered into by the order as it were of the person by whom he was appointed.

30. The same (on Plautius, 5). A person who, having the intention to take up a loan of money, has made a formal *sponsio* to the intended lender, has it in his power to avoid liability by refusing to accept the loan.[2]

31. The same (on Plautius, 17). When a *condictio* has been brought to recover land or a slave, I think the law at the present day is that after joinder of issue all accruing benefits (*causa*) must be delivered up, that is to say, all that the plaintiff would have had if restitution had been made at the time of *litis contestatio*. (1) In ignorance of your rights I bought in good faith your slave from a thief;[3] out of his *peculium*, which belonged

[1] As an alternative to the *a. institoria*. See Girard, p. 713, n. 2; B. pp. 547, 684.

[2] He is not liable to a *condictio* because the promise is dependent on the loan and he has not received anything. He may of course be liable for breach of contract if he has undertaken to receive a loan, but the form of action would not be *condictio*. Cf. h.t. 24.

[3] The same case is given in an extract from Julian in D. 19. 1. 24. 1.

emi: is ex peculio, quod ad te pertinebat, hominem paravit, qui mihi traditus est. Sabinus Cassius posse te mihi hominem condicere: sed si quid mihi abesset ex negotio quod is gessisset, *invicem me tecum acturum. et hoc verum est:* nam et Iulianus ait videndum, ne dominus integram ex empto actionem habeat, venditor autem condicere possit bonae fidei emptori. quod ad peculiares nummos attinet, si exstant, vindicare eos dominus potest, sed actione de peculio tenetur venditori, ut pretium solvat: si consumpti sint, actio de peculio evanescit. sed adicere

to you,[1] he bought a slave, and this slave was delivered to me.[2] Sabinus and Cassius are of opinion that you can bring a *condictio* for the slave thus purchased against me;[3] but that if I have suffered any loss from the transaction which your slave entered into,[4] I can in turn sue you. And this is correct, for Julian also says that we must consider[5] whether the owner's right of action *ex empto* is not left unaffected, whilst the vendor can bring a *condictio* against the *bona fide* purchaser.[6] As to the money which came out of the *peculium*, if the coins can be identified, the owner of the slave can bring a *vindicatio* for them, but he is liable to the vendor in an action *de peculio* for payment of the price:[7] if they have been spent, the action *de peculio* ceases to be available.[8] But Julian ought to have added that the vendor is liable to the owner of the slave in an action *ex*

[1] Sc. acquired neither *ex operis suis* nor *ex re mea*. G. 2. 92; J. Inst. 2. 9. 4.

[2] The *servus vicarius* was therefore in my possession, as I supposed myself to be owner of the *ordinarius*.

[3] Having been delivered to me on the assumption that I was the owner.

[4] E.g. I may have been put to expense in maintaining him, for this may have come from my own funds, or from a part of the *peculium* of the *ordinarius* which belongs to me. If you sue me for the *servus vicarius*, I can claim these expenses as a set-off. If I deliver him to you without claiming the set-off, a *condictio* will lie at my instance to recover this outlay. D. 12. 6. 40. 1.

[5] *videndum*. Implying that the writer considered that the answer should be in the affirmative.

[6] The owner of the *ordinarius* has an action *ex empto* against the person who sold the *vicarius* to the *ordinarius*, for he has delivered the *vicarius* to the wrong person. But the vendor in turn has a *condictio* (*indebiti* or *sine causa*) against the *bonae fidei possessor* of the *ordinarius* to whom he delivered the *vicarius*.

[7] The actual coins paid if they can be identified belong to him and may be claimed by *vindicatio*. But if he does so he must either return the *vicarius* or pay for him with other money.

[8] If the purchase money has been spent, the action *de peculio* ceases to be available. The vendor has received his payment and as the purchase money cannot be recovered from him has no further claim.

debuit Iulianus non aliter domino servi venditorem ex empto teneri, quam si ei pretium solidum et quaecumque, si cum libero contraxisset, deberentur, dominus servi praestarct. idem dici debet, si bonae fidei possessori solvissem, si tamen actiones, quas adversus eum habeam, praestare domino paratus sim.

32. CELSUS libro quinto digestorum. Si et me et Titium mutuam pecuniam rogaveris et ego meum debitorem tibi promittere iusserim, tu stipulatus sis, cum putares eum Titii debitorem esse, an mihi obligaris? subsisto, si quidem nullum negotium mecum contraxisti: sed propius est ut obligari te existimem, non quia pecuniam tibi credidi (hoc enim nisi inter consentientes fieri non potest): sed quia pecunia mea ad te pervenit, eam mihi a te reddi bonum et aequum est.

empto only on condition of the latter paying to him the price in full as well as anything further which would have been due if he had made the contract with a freeman.[1] The same must be said[2] where I have delivered the slave to the *bona fide* possessor, provided always that I am ready to assign to the owner the actions which I have against the possessor.[3]

32. Celsus (Digesta, 5). If you have requested both Titius and me to lend you money, and I have directed my debtor to enter into an engagement to pay the money to you, and then you have stipulated with him under the impression that he was the debtor of Titius, are you under an obligation to repay me? I hesitate to give an opinion, if indeed you have made no contract with me; but it is more in accordance with equity that I should consider you bound, not because I have lent you money (for this cannot be the case except between consenting parties), but because my money has come into your hands, and it is just and fair that it should be restored to me by you.[4]

[1] Julian is contrasting the rights of the vendor of the *vicarius* as plaintiff and of the *dominus* of the *ordinarius* as plaintiff. If the former sues, he can only claim to the extent of the *peculium* of the *ordinarius*; if the latter sues, he can claim the slave or his full value, if he has himself done all that good faith requires. *Et quaecumque* covers interest, for instance, if he claims fulfilment of the contract some time after it was made. This follows from the action *ex empto* being *bonae fidei*.

[2] Sc. the vendor is not liable to the action *ex empto* of the *dominus ordinarii*.

[3] Sc. the *condictio indebiti* or *sine causa*.

[4] There is no *mutuum* because of the mistake of the borrower. Cf. the English case of *Gordon* v. *Street* (1899) 2 Q.B. 641. I can, however, recover the money by *condictio* as you have obtained it *sine causa*, the payment not being received by you as made under your agreement with me.

33. MODESTINUS libro decimo pandectarum. Principalibus constitutionibus cavetur, ne hi qui provinciam regunt quive circa eos sunt negotientur mutuamve pecuniam dent faenusve exerceant.

34. PAULUS libro secundo sententiarum. Praesidis provinciae officiales, quia perpetui sunt, mutuam pecuniam dare et faenebrem exercere possunt. (1) Praeses provinciae mutuam pecuniam faenebrem sumere non prohibetur.

35. MODESTINUS libro tertio responsorum. Periculum nominum ad eum, cuius culpa deterius factum probari potest, pertinet.

36. IAVOLENUS libro primo epistularum. Pecuniam, quam mihi sine condicione debebas, iussu meo promisisti Attio sub condicione: cum pendente condicione in eo statu sit obligatio tua adversus me, tamquam sub contrariam condicionem eam *mihi spopondisti, si pendente condicione petam, an nihil* acturus sum? respondit: non dubito, quin mea pecunia, quam ipse sine condicione stipulatus sum, etiam si condicio in persona Attii, qui ex mea voluntate eandem pecuniam sub condicione

33. Modestinus (Pandectae, 10). It is laid down in Imperial Constitutions that provincial governors and the members of their staffs shall not engage in trade, lend money or practise usury.

34. Paulus (Sententiae, 2). The officials of the governor of a province, as their offices are permanent, are able to lend money and practise usury. (1) The governor of a province is not forbidden to borrow money at interest.

35. Modestinus (Responsa, 3). The risk in respect of the enforcement of debts falls on the person by whose fault the debt can be proved to have been made insecure.

36. Iavolenus (Epistolae, 1). Acting under my instructions, *you have promised, subject to a condition, to pay Attius money* which you owed to me unconditionally. Seeing that, whilst the condition is pending, your obligation to me is in the same position as if you had promised the money to me subject to the reverse condition, if I sue while the condition is pending, shall I sue in vain? The answer was: I have no doubt that my money, for which I myself stipulated unconditionally, remains as a debt,[1] even though the condition relating to Attius, who has with my consent stipulated for the same money subject to a

[1] There is no novation.

stipulatus est, non extiterit, credita esse permaneat (perinde est enim, ac si nulla stipulatio intervenisset): pendente autem causa condicionis idem petere non possum, quoniam, cum incertum sit, an ex ea stipulatione deberi possit, ante tempus petere videor.

37. PAPINIANUS libro primo definitionum. Cum ad praesens tempus condicio confertur, stipulatio non suspenditur et, si condicio vera sit, stipulatio tenet, quamvis tenere contrahentes condicionem ignorent, veluti "si rex Parthorum vivit, centum mihi dari spondes?" eadem sunt et cum in praeteritum condicio confertur.

38. SCAEVOLA libro primo quaestionum. Respiciendum enim esse, an, quantum in natura hominum sit, possit scire eam debitu iri.

39. PAPINIANUS libro primo definitionum. Itaque tunc potestatem condicionis optinet, cum in futurum confertur.

condition, does not come to pass [for the position is as if no stipulation (by Attius) had intervened]: nevertheless, so long as the result of the condition is in suspense, I cannot sue for the money, because, it being uncertain whether it may not become due under the latter stipulation, I appear to bring my action prematurely.[1]

37.[2] Papinianus (Definitiones, 1). When a condition is made with reference to the present time, the stipulation is not in suspense, and if the circumstance constituting the condition is really a fact, the stipulation is binding, although the parties to the contract may not know that the condition is satisfied; as, for instance, "if the king of the Parthians is living, do you promise to give me one hundred (*aurei*)?" The rule is the same when the condition refers to what is past.

38.[2] Scaevola (Quaestiones, 1). For we have to take into consideration whether, so far as human nature admits, it is possible to know that the money will be due.

39.[2] Papinianus (Definitiones, 1). Hence, a proviso only acquires the force of a condition when it depends on a future contingency.

[1] This would amount to *plus petitio tempore*. G. IV. 53.

[2] The excerpts 37, 38 and 39 should more appropriately be included in the title of the Digest *De verborum obligationibus* (45. 1). They appear here because where the subject-matter of the stipulation is a *certum* the proper action is a *condictio*. See h.t. 24.

40. PAULUS libro tertio quaestionum. Lecta est in auditorio Aemilii Papiniani praefecti praetorio iuris consulti cautio huiusmodi: "Lucius Titius scripsi me accepisse a Publio Maevio quindecim mutua numerata mihi de domo et haec quindecim proba recte dari kalendis futuris stipulatus est Publius Maevius, spopondi ego Lucius Titius. si die supra scripta summa Publio Maevio cive ad quem ea res pertinebit data soluta satisve eo nomine factum non erit, tunc eo amplius, quo post solvam, poenae nomine in dies triginta inque denarios centenos denarios singulos dari stipulatus est Publius Macvius, spopondi ego Lucius Titius. convenitque inter nos, uti pro Maevio ex summa supra scripta menstruos refundere debeam denarios trecenos ex omni summa ei heredive eius." quaesitum est de obligatione usurarum, quoniam numerus mensium, qui

40. Paulus (Quaestiones, 3).[1] There was read in the court of Aemilius Papinianus, Prefect of the Praetorium and Jurisconsult, a bond in these terms: "I, Lucius Titius, have acknowledged in writing that I have received from Publius Maevius fifteen (*aurei*) on loan, paid to me from his domestic funds,[2] and Publius Maevius has stipulated and I, Lucius Titius, have promised, that the said fifteen (*aurei*) of approved coin shall be duly paid on the ensuing Kalends. If on the above mentioned day the said sum of money shall not have been given and paid to Publius Maevius, or to the person who shall be entitled to it,[3] or if security has not been given for such payment, then in addition thereto, for such time as I am in arrear in payment, Publius Maevius has stipulated and I, Lucius Titius, have promised that there shall be given by way of penalty, for every thirty days and for every hundred *denarii*, one *denarius*. And it is agreed between us[4] that, for the convenience of

[1] This excerpt should more appropriately have been placed in D. 2. 14 (*De Pactis*), as it deals with the effect of a pact made concurrently (*in continenti*) with a stipulation. On the question raised see B. p. 528; Girard, p. 637, n. 2.

[2] *de domo.* See Dirksen, s.v. Cf. Cicero, *Pro P. Quinctio*, III. 13 (de communi quodcumque poterat ad se *in privatam domum* sevocabat).

[3] I.e. "to Publius Maevius or his heir", as appears from the latter part of the agreement.

[4] *convenit.* The change of phrase implies that the clause for payment by instalments was an arrangement by way of *pactum adiectum* not formally stipulated. On the original stipulation the whole sum was due on a day specified, but for the convenience of the creditor "pro Publio Maevio", the first instalment alone was to be paid then, and further instalments at later dates.

solutioni competebat, transierat. dicebam, quia pacta in continenti facta stipulationi inesse creduntur, perinde esse, ac si per singulos menses certam pecuniam stipulatus, quoad tardius soluta esset, usuras adiecisset: igitur finito primo mense primae pensionis usuras currere et similiter post secundum et tertium tractum usuras non solutae pecuniae pensionis crescere nec ante sortis non solutae usuras peti posse quam ipsa sors peti potuerat. pactum autem quod subiectum est quidam dicebant ad sortis solutionem tantum pertinere, non etiam ad usurarum, quae priore parte simpliciter in stipulationem venissent pactumque id tantum ad exceptionem prodesse et ideo non soluta pecunia statutis pensionibus ex die stipulationis usuras deberi, atque si id nominatim esset expressum. sed

Maevius, I shall, out of the aforesaid sum, repay each month three hundred *denarii* of the whole sum to him or his heir." The question arose as to the obligation to pay interest, since he (Lucius Titius) had exceeded the number of months which was allowed for payment.[1] My answer was that as pacts made at the same time as a stipulation are considered to form part of it, the position is the same as if he had stipulated for a certain sum each month and had added an agreement to pay interest in so far as there should be any delay in payment; therefore, when the first month had expired, interest would run on the first instalment, and similarly, after the second and third periods, interest on the unpaid amount of the instalment would accrue,[2] but interest could not be claimed on any unpaid principal until the principal itself could be sued for. But some maintained that the pact which was added referred only to the payment of the principal and not of the interest also, which had been made the subject of an unqualified stipulation in the earlier part of the bond, and that the pact was only available as an *exceptio*; and therefore, the money not having been paid by the agreed instalments, interest was due from the date of the stipulation,[3]

[1] I.e. allowed by the pact providing for payment by instalments. Interest was due according to the original stipulation, but an extension of time had been allowed by the pact. The question therefore was how the interest was to be calculated, whether from the day fixed in the stipulation on the whole principal or on the unpaid instalments from the time they respectively became due.

[2] The interest was due *ex mora* and there was no default when the payments were postponed by the pact.

[3] From the time fixed in the stipulation, that is, *ex futuris kalendis*.

cum sortis petitio dilata sit, conscquens est, ut etiam usurae ex eo tempore, quo moram fecit, accedant, et si, ut ille putabat, ad exceptionem tantum prodesset pactum (quamvis sententia diversa optinuerit), tamen usurarum obligatio ipso iurc non committetur: non enim in mora est is, a quo pecunia propter exceptionem peti non potest. sed quantitatem, quae medio tempore colligitur, stipulamur, cum condicio exstiterit, sicut est in fructibus: idem et in usuris potest exprimi, ut ad diem non soluta pecunia quo competit usurarum nomine cx die interpositae stipulationis praestetur.

41. AFRICANUS libro octavo quaestionum. Eius, qui in provincia Stichum servum kalendario praeposuerat, Romae

just as if it had been expressly so stated. But, seeing that the right of action for the principal has been postponed,[1] it follows that interest also accrues from the time when the debtor made default; and even if, in accordance with the latter view,[2] the pact would be available only by way of *exceptio* (although the contrary opinion has prevailed), nevertheless the obligation to pay interest will not be enforceable as a matter of strict law; for a person is not in default where money cannot be claimed from him by reason of an *exceptio*.[3] However, we do stipulate sometimes that a quantity which is accumulated during an interval shall be handed over on a condition becoming satisfied, as happens in the case of fruits: the same provision may be expressly made as to interest also, so that when money is not paid on the appointed day, the amount which is attributable to interest from the day when the stipulation was made shall be payable.[4]

41. Africanus (Quaestiones, 8). The testament was published at Rome of a man who had employed his slave, Stichus, to manage a money-lending business in a province,[5] whereby the

[1] Sc. by the *pactum adiectum*.

[2] Paulus apparently forgets that he has said above *quidam dicebant* and drops into the singular, "as the *objector* thought" instead of "as the *objectors* thought".

[3] It was enforceable as a matter of strict law if the *pactum adiectum* was not part of the contract. But, even though it only gave rise to an *exceptio* the claim to interest on the basis of strict law would be overridden by the *exceptio*.

[4] The concluding paragraph merely states that if there is an express agreement it will prevail over a presumption which arises in the absence of such express agreement. *Expressum facit cessare tacitum.*

[5] *Kalendarium. Liber pecuniae creditae foenebris, Index nominum et usurarum debitarum* (Dirksen). See also Heumann Seckel, s.v.

testamentum recitatum erat, quo idem Stichus liber et ex parte heres erat scriptus: qui status sui ignarus pecunias defuncti aut exegit aut credidit, ut interdum stipularetur et pignora acciperet. consulebatur quid de his iuris esset. placebat debitores quidem ei qui solvissent liberatos esse, si modo ipsi quoque ignorassent dominum decessisse. earum autem summarum nomine, quae ad Stichum pervenissent, familiae erciscundae quidem actionem non competere coheredibus, sed negotiorum gestorum dari debere. quas vero pecunias ipse credidisset, eas non ex maiore parte, quam ex qua ipse heres sit, alienatas esse: nam et si tibi in hoc dederim nummos, ut eos Sticho credas, deinde mortuo me ignorans dederis, accipientis non facies: neque enim sicut illud

said Stichus was given his freedom and appointed heir to a part; and the latter, not knowing of his change of status, continued to collect the debts due to or to lend the money of the deceased, so that occasionally he made stipulations and took pledges for repayment. An opinion was requested as to what was the law affecting these transactions. It was decided that the debtors who had paid him were certainly discharged, provided only that they were also unaware of the death of his master. But with regard to such sums of money as had come to Stichus' hands, an action *familiae erciscundae* was not available to the co-heirs,[1] but an action *negotiorum gestorum* ought to be allowed. As to the money which he himself had lent, the property in this was not transferred to a greater extent than the share to which he was entitled as heir:[2] for even if I give you money in order that you may lend it to Stichus, and then you give it to him after my death, but in ignorance of the fact, you will not make the money the property of the recipient;[3]

The reasons for this are (1) they cannot sue Stichus as a *co-heres* for he did not take payment in that capacity, not knowing that he was appointed one of the heirs; (2) apart from his knowledge of the fact he *could* possibly have secured his own rights without interfering with the interests of his co-heirs, for he could have taken payment of his own proportion and left them to exact theirs. Hence the rule stated in D. 10. 3. 6. 2 may be applied, viz. that proceedings by *communi dividundo* (and also by *familiae erciscundae* to which the same principle applies) cannot be taken unless something has been done by a co-owner (or co-heir), without doing which he could not adequately guard his own interest.

[2] But it might be added that he did not pass the property even in his own share as he acted in ignorance that it belonged to him. D. 41. 1. 35; 12. 4. 3. 8.

[3] The mandate is revoked by the death of the *mandator*. J. Inst. III. 26. 10; D. 17. 1. 26 pr. and 1.

receptum est, ut debitores solventes ei liberentur, ita hoc quoque receptum, ut credendo nummos alienaret. quare si nulla stipulatio intervenisset, neque ut creditam pecuniam pro parte coheredis peti posse neque pignora teneri. quod si stipulatus quoque esset, referret quemadmodum stipulatus esset: nam si nominatim forte Titio domino suo mortuo iam dari stipulatus sit, procul dubio inutiliter esset stipulatus. quod si sibi dari stipulatus esset, dicendum hereditati eum adquisisse: sicut enim nobismet ipsis ex re nostra per eos, qui liberi vel alieni servi bona fide serviant, adquiratur, ita hereditati quoque ex re hereditaria adquiri. post aditam vero a coheredibus hereditatem non aeque idem dici potest, utique si scierint eum sibi coheredem datum, quoniam tunc non possunt videri bonae fidei possessores esse, qui nec possidendi animum haberent. quod si proponatur coheredes eius id ignorasse,

for, notwithstanding that it is admitted to be the law that debtors who pay Stichus are discharged, it is not likewise established that he passes the property in money by lending it. Therefore, if no stipulation was interposed, an action cannot be brought in respect of the share of a co-heir as for money lent nor can the pledges be retained. If, however, a stipulation was also made, it would be a matter of importance in what form the stipulation was made. For if (say) he stipulated expressly for payment to his master, Titius, who was already dead, undoubtedly he made a void stipulation. But if he stipulated for payment to himself, it must be said that he acquired the benefit of the stipulation for the inheritance;[1] for just as acquisitions are made for us arising out of the use of our property through the agency of those persons, whether free or the slaves of others, who are serving us in good faith, so also what is acquired by the use of property belonging to the inheritance is acquired for the inheritance. But after entry by his co-heirs on the inheritance, the same cannot be said with equal accuracy, at any rate if they knew that he was appointed co-heir with them, since in that case they cannot be regarded as possessors in good faith, seeing that they had not the intention

[1] He is part of the inheritance, or at any rate in good faith considers himself part of the inheritance and acting on its behalf until he has notice that he is free. He therefore acquires for the inheritance as a freeman *bona fide serviens*. The acquisition is also *ex operis suis*, as his employment is as *dispensator* or steward.

quod forte ipsi quoque ex necessariis fuerint, potest adhuc idem responderi: quo quidem easu illud eventurum, ut, si suae condicionis coheredes iste servus habcat, invicem bona fide servire videantur.

42. CELSUS libro sexto digestorum. Si ego decem stipulatus a Titio deinceps stipuler a Scio, quanto minus a Titio consequi possim: si decem petiero a Titio, non liberatur Seius, alioquin nequicquam mihi cavetur: at si iudicatum fecerit Titius, nihil ultra Seius tenebitur. sed si cum Seio egero, quantumcumque est quo minus a Titio exigere potuero eo tempore, quo iudicium inter me et Scium acceptum est, tanto minus a Titio postea peterc possum. (1) Labeo ait, cum decem dari curari stipulatus

of possessing.[1] But if it is assumed that his co-heirs were ignorant of the fact, because perhaps they also were *heredes necessarii*, the same answer may still be given; in which case this result will follow, that if the slave in question has co-heirs of the same condition as himself, they appear mutually to serve each other in good faith.[2]

42. Celsus (Digesta, 6).[3] If, having stipulated for ten (*aurei*) from Titius, I afterwards stipulate from Seius for any deficiency in the amount which I may recover from Titius, then, if I sue Titius for ten, Seius is not discharged, for otherwise his promise to me is of no manner of use; if, however, Titius has satisfied the judgment, Seius will not be further liable. But if I take action against Seius, whatever the deficiency is in the amount which I could obtain from Titius at the time when issue is joined between me and Seius, so much the less can I afterwards claim from Titius. (1) Labeo says that when you have stipulated that provision shall be made for the giving of ten (decem "*dari curari*"),[4] you cannot allege in your

[1] I.e. of possessing Stichus. If they did not know, Stichus acquires for the inheritance which belongs to them jointly with Stichus. This is what is meant in the next sentence also, "*potest adhuc idem responderi*".

[2] This difficult excerpt is dealt with at some length by Prof. Buckland, *Roman Law of Slavery*, pp. 382–3.

[3] This excerpt should also be placed under the title *De verborum obligationibus* (D. 45. 1).

[4] There are considerable variations of reading in the MSS, some having *dari* alone, others *curari* alone, others *curari dari*, others *dari curari*. The last appears the most trustworthy, for in 45. 1. 67 Ulpian writes "eum qui decem *dari sibi curari* stipulatus sit", and further on adds "idque et Celsus libro sexto Digestorum refert", apparently quoting the passage in this text.

sis, ideo non posse te decem dare oportere intendere, quia etiam reum locupletiorem dando promissor liberari possit: quo scilicet significat non esse cogendum eum accipere iudicium, si reum locupletem offerat.

pleading that the defendant is legally bound to give ("*dare oportere*") because the promisor can be discharged from his obligation also by providing a more substantial debtor;[1] by which statement he clearly means that the promisor cannot be compelled to join issue (on a claim in that form) if he tenders a substantial debtor.

[1] Sc. as an alternative to paying the money. Hence there would be a *plus petitio ex causa* if by your claim you exclude his option. G. IV. 53 a.

II. DE CONDICTIONE CAUSA DATA CAUSA NON SECUTA[1]

D. 12. 4

1. ULPIANUS libro vicensimo sexto ad edictum. Si ob rem non inhonestam data sit pecunia, ut filius emanciparetur vel servus manumitteretur vel a lite discedatur, causa secuta repetitio cessat. (1) Si parendi condicioni causa tibi dedero decem, mox repudiavero hereditatem vel legatum, possum condicere.

2. HERMOGENIANUS libro secundo iuris epitomarum. Sed et si falsum testamentum sine scelere eius qui dedit vel inofficiosum pronuntictur, veluti causa non secuta decem repetentur.

Concerning the *condictio* to recover a thing given for a purpose which has failed.[1]

1. Ulpianus (on the Edict, 26). If money has been given for a purpose which is not contrary to morality, that a son, for instance, should be emancipated, or a slave manumitted or a suit abandoned, recovery is barred when the purpose has been carried out. (1) If I give you ten (*aurei*) in order that I may comply with a condition, and afterwards decline an inheritance[2] or a legacy (given to me subject to that condition), I can bring a *condictio* for the return of the money.

2. Hermogenianus (Iuris Epitomae, 2). So also if a testament be declared to be a forgery or void as inofficious, without any wrong doing on the part of the person who gave the money, the ten (*aurei*) can be recovered on the ground of the purpose not having been effected.

[1] In C. 4. 6 the rubric is "De condictione ob causam datorum". The expression "causa data causa non secuta" is not found elsewhere and is difficult to explain. See Roby, *Roman Private Law*, II, p. 77, note: and B. p. 545.

[2] He complies with a condition which will entitle him to the offer of the inheritance, not with one which actually makes him heir. Once he becomes heir (apart from the possibility of *in integrum restitutio*) he cannot renounce. D. 28. 5. 86 pr.; 35. 1. 5.

3. ULPIANUS libro vicensimo sexto ad edictum. Dedi tibi pecuniam, ne ad iudicem iretur: quasi decidi. an possim condicere, si mihi non caveatur ad iudicem non iri? et est verum multum interesse, utrum ob hoc solum dedi, ne eatur, an ut et mihi repromittatur non iri: si ob hoc, ut et repromittatur, condici poterit, si non repromittatur: si ut ne eatur, condictio cessat quamdiu non itur. (1) Idem erit et si tibi dedero, ne Stichum manumittas: nam secundum distinctionem supra scriptam aut admittenda erit repetitio aut inhibenda. (2) Sed si tibi dedero, ut Stichum manumittas: si non facis, possum condicere, aut si me poeniteat, condicere possum. (3) Quid si

3. Ulpianus (on the Edict, 26). I gave you money on the understanding that an action should not be referred to a judge: in fact I made a sort of compromise.[1] Can I bring a *condictio* if security is not given to me that the case shall not be referred to a judge? The truth of the matter is that it makes a great difference whether I gave the money solely on the understanding that the case should not be referred, or, on the other hand, on the understanding that security also should be given to me that such reference shall not be made; if it was for the latter purpose, viz. that security also should be given, a *condictio* can be brought if security is not furnished; if on the understanding merely of not proceeding to a reference, there is no right to a *condictio* so long as a reference is not made. (1) The same may be said also if I have given you money on the understanding that you do not manumit Stichus; for in accordance with the above-mentioned distinction recovery of the money will be allowed or refused. (2) But if I have given you money on the understanding that you manumit Stichus, if you do not do so,[2] I can bring a *condictio* for the money, or if I change my mind[3] on the matter, I can likewise bring a *condictio*. (3) But what if I

[1] *quasi decidi.* The money is given without any definite agreement on the part of the recipient that he will not proceed but although there is no pact which would enable an *exceptio* to be raised, if he goes on with his action the money can be recovered. A *transactio* was usually supported by a formal agreement and frequently security was given. See B. pp. 525–6.

[2] *si non facis*, i.e. after notice. There was no *mora* unless notice had been given except where a time for performance had been fixed, in which case *tempus interpellat pro homine.*

[3] *si me poeniteat.* Change of mind was probably not a ground for *condictio* in classical law. Here and in the next paragraph and also in 5. 1 and 2 *infra* there has probably been interpolation by the compilers (see Gradenwitz, *Interpol.* § 18 and Lenel, *Paling.* II, pp. 390–1).

ita dedi, ut intra certum tempus manumittas? si nondum tempus praeteriit, inhibenda erit repetitio, nisi poeniteat: quod si praeteriit, condici poterit. sed si Stichus decesserit, an repeti quod datum est possit? Proculus ait, si post id temporis decesserit, quo manumitti potuit, repetitionem esse, si minus, cessare. (4) Quin immo et si nihil tibi dedi, ut manumitteres, placuerat tamen, ut darem, ultro tibi competere actionem, quae ex hoc contractu nascitur, id est condictionem defuncto quoque eo. (5) Si liber homo, qui bona fide serviebat, mihi pecuniam dederit, ut eum manumittam, et fecero: postea liber probatus an mihi condicere possit, quaeritur. et Iulianus libro undecimo digestorum scribit competere manumisso repetitionem. Neratius etiam libro membranarum refert Paridem pantomimum a Domitia Neronis filia decem, quae ei pro libertate dederat,

have given you the money on the understanding that you *manumit him within a certain time? If the time has not* yet expired, recovery will not be allowed, unless I change my mind:[1] but if the time has expired, a *condictio* can be brought. But suppose that Stichus has died, can the money which was given be reclaimed? According to Proculus, if he died after the time at which he could have been manumitted, the money can be recovered, but if not, no action lies. (4) Moreover, even if I have given you nothing to manumit him, but an agreement had been made[2] that I should give something, still the action which arises from this contract, i.e. a *condictio*, will be available to you, although the slave is dead. (5) If a freeman, who was serving me as a slave *bona fide*, has given me money to manumit him, and I have done so, the question arises whether, if he has afterwards been proved to be a freeman, he can sue me to recover the money. And Julian, in the eleventh book of his Digesta, tells us that an action for recovery of the money will be available to the manumitted man.[3] Neratius also, in his book of Membranae, relates that Paris, the actor, reclaimed before a *iudex* from Domitia, the daughter of Nero, ten (*aurei*)

[1] See note 3, p. 35.

[2] *placuerat* implies more than mere agreement, for immediately after this a contract is mentioned, implying that there has been a stipulation. The *condictio* would be *incerti* for release from the agreement to give. The passage may be interpolated.

[3] He has a *condictio* to recover what he has paid; for though the object of the payment was impossible, he thought it possible, believing himself at the time to be a slave. Cf. C. 4. 6. 6.

repetisse per iudicem nec fuisse quaesitum, an Domitia sciens liberum accepisset. (6) Si quis quasi statuliber mihi decem dederit, cum iussus non esset, condicere cum decem Celsus scribit. (7) Sed si servus, qui testamento heredi iussus erat decem dare et liber esse, codicillis pure libertatem accepit et id ignorans dederit heredi decem, an repetere possit? et refert patrem suum Celsum existimasse repetere eum non posse: sed ipse Celsus naturali aequitate motus putat repeti posse. quae sententia verior est, quamquam constet, ut et ipse ait, eum qui dedit ea spe, quod se ab eo qui acceperit remunerari existimaret vel amiciorem sibi esse eum futurum, repetere non posse opinione falsa deceptum. (8) Suptilius quoque illud tractat, an ille, qui se statuliberum putaverit, nec fecerit nummos accipi-

which he had given to her for his freedom, and no question was raised as to whether Domitia had received the money with knowledge that he was a free man.[1] (6) If a man has given me ten (*aurei*), on the supposition that he is a *statuliber*,[2] whereas he has not been directed to do this, he may, according to Celsus, recover the ten (*aurei*) by *condictio*. (7) But if a slave, who has been directed in a testament to give to the heir ten (*aurei*) and thereupon have his freedom, has received an unconditional gift of freedom in a codicil and, not knowing this, has paid the ten (*aurei*) to the heir, can he claim to have the money returned? And Celsus relates that his father, Celsus (the elder), was of opinion that he could not recover; but he himself, following natural equity, thinks that an action can be brought. And this opinion is the more correct one, although it is admitted, as Celsus also himself says, that a man who has given money in the hope of and because he thought that he would obtain some reward from the receiver, or that the latter would be more kindly disposed to him, cannot recover the money on the ground that he was misled by a false impression.[3] (8) He (Celsus) also discusses with some minuteness this question, whether the man who thought he was a *statuliber*[4] did not fail to make the money the property of the receiver;

[1] *nec fuisse quaesitum*. The decision went against her on the simple ground that she had taken money to do what she could not possibly do.

[2] As to the position of a *statuliber*, see B. pp. 75–6.

[3] The expectation is not communicated to the receiver and therefore there is no basis of obligation. It is also too vague, even if communicated.

[4] *se statuliberum putaverit*, i.e. on condition of giving ten. Ulpian is still discussing the case put in the preceding paragraph (h.t. 3. 7).

entis, quoniam heredi dedit quasi ipsius heredis nummos daturus, non quasi suos, qui utique ipsius fuerunt, adquisiti scilicet post libertatem ei ex testamento competentem. et puto, si hoc animo dedit, non fieri ipsius: nam et cum tibi nummos meos quasi tuos do, non facio tuos. quid ergo, si hic non heredi, sed alii dedit, cui putabat se iussum? si quidem peculiares dedit, nec fecit accipientis: si autem alius pro eo dedit aut ipse dedit iam liber factus, fient accipientis. (9) Quamquam permissum sit statulibero etiam de peculio dare implendae condicionis causa, si tamen vult heres nummos salvos facere, potest eum vetare dare: sic enim fiet, ut et statuliber perveniat ad libertatem quasi impleta condicione cui parere prohibitus

seeing that he gave the money to the heir on the supposition that he was to give money belonging to the heir himself and not as being his own, whereas, in fact, the money was his own, having been acquired, let us suppose, after his freedom had become effective under the testament. And I think that if he gave the money under this impression it did not become the property of the heir: for even when I give you money belonging to me thinking it is yours, I do not make it your property.[1] What then if he gave the money not to the heir, but to some other person to whom he thought he was ordered to give it? If indeed it was part of his *peculium*, he did not make the money the property of the receiver;[2] but if, on the other hand, after he became free, another person gave it on his behalf, or he himself gave it, it will become the property of the receiver. (9) Although permission has been given[3] to a *statuliber* to pay money, even out of his *peculium*, for the purpose of fulfilling a condition (attached to the gift of freedom), yet the heir, if he wishes to keep the money intact, can forbid him to give it; the result then will be that the *statuliber* will obtain his freedom on the ground that the condition with which he has been forbidden to comply is taken as being satisfied,[4] and the money will not

[1] There must be an intention to transfer the ownership by one party and an intention to acquire the ownership on the part of the other See *D.* 41. 1. 35; 18. 1. 15. 2

[2] When the ownership of the money does not pass the remedy is *vindicatio*, unless the money has been spent by the receiver, in which case the *condictio* can be resorted to

[3] I e in the testament.

[4] *quasi impleta condicione*. The condition which he is unable to fulfil because of the heir's prohibition is treated as satisfied, in accordance with the principle "iure civili receptum est quoties per eum cuius interest conditionem impleri, fit quominus impleatur, ut perinde habeatur ac si impleta conditio fuisset". D. 35. 1. 24: cf. D. 35. 1. 81. 1; 50. 17. 39.

est, et nummi non peribunt. sed is, quem testator acciperc voluit, adversus heredem in factum actionc agere potest, ut testatori pareatur.

4. IDEM libro trigensimo nono ad edictum. Si quis accepto tulerit debitori suo, cum conveniret ut expromissorem daret, nec illc det, potest dici condici posse ei, qui acccpto sit liberatus.

5. IDEM libro secundo disputationum. Si pecuniam idco acceperis, ut Capuam eas, deinde parato tibi ad proficiscendum condicio temporis vel valetudinis impedimento fuerit, quo minus proficiscereris, an condici possit, videndum: et cum per te non steterit, potest dici repetitionem cessare: sed cum liceat poenitere ei qui dedit, procul dubio repetetur id quod datum est, nisi forte tua intersit non acccpisse tc ob hanc causam pecuniam. nam si ita se res habeat, ut, licet nondum profectus sis, ita tamen rem composueris, ut necesse habeas proficisci, vel be lost. But the person whom the testator desired to receive the money can proceed against the heir by an action *in factum* to secure that the testator's wishes shall be obeyed.

4. The same (on the Edict, 39). If a man has given a formal discharge (*acceptilatio*) to his debtor in pursuance of an agreement that the latter should provide a substitute (*expromissor*), and he fails to provide one, it may be asserted that the person who has obtained the formal discharge is liable to a *condictio*.[1]

5. The same (Disputationes, 2). If you have received money for the purpose of going to Capua, and when you were ready to set out, the state of the weather or of your health prevented you from starting, we must consider whether a *condictio* will lie: and if it was not due to any fault on your part, it may be said that the money cannot be reclaimed; but, seeing that it is open to the person who gave the money to change his mind,[2] it is clear that what has been given can be recovered, unless perchance it would have been to your advantage not to have received money for this purpose. For, if the circumstances are

[1] The *condictio* is not on the original stipulation for that has been destroyed by the *acceptilatio*. It is *causa data causa non secuta* to cancel the *acceptilatio*, a sort of *restitutio in integrum*. The parties then being under the original contract, a *condictio certi* may be brought on the stipulation, if for a certain sum of money: otherwise an *actio ex stipulatu*. Cf. D. 16. 1. 8. 8.

[2] *sed cum liceat*. See note 3, p. 35. The contradiction of the previous statement clearly points to interpolation here. In the classical period the money could not be recovered. See B. p. 546.

sumptus, qui necessarii fuerunt ad profectionem, iam fecisti, ut manifestum sit te plus forte quam accepisti erogasse, condictio cessabit: sed si minus erogatum sit, condictio locum habebit, ita tamen, ut indemnitas tibi praestetur eius quod expendisti. (1) Si servum quis tradiderit alicui ita, ut ab eo intra certum tempus manumitteretur, si poenituerit eum qui tradiderit et super hoc eum certioraverit et fuerit manumissus post poenitentiam, attamen actio propter poenitentiam competit ei qui dedit. plane si non manumiserit, constitutio succedit facitque eum liberum, si nondum poenituerat eum qui in hoc dedit. (2) Item

such that, although you have not yet started, you have nevertheless so arranged matters that you are bound to take the journey, or you have already incurred expenses which were necessary for your departure, so that it is clear that you have expended more, perhaps, than you have received, a *condictio* will not be available: but if less has been expended, a *condictio* will lie, subject however to this, that you are indemnified in respect of what you have expended.[1] (1) If any one has delivered a slave to another on the understanding that he is to be manumitted by the latter within a certain time, then, if the person who has delivered the slave has changed his mind and has thereupon informed the other of the fact,[2] but the slave has been manumitted after his change of mind, an action is nevertheless available to the person who delivered the slave by reason of his change of mind.[3] Clearly, if the other has not manumitted the slave,[4] the imperial constitution[5] applies and makes the slave free, if the person who delivered him for that purpose has not by that time changed his mind. (2) Again, if

[1] *nam si ita se res habeat.* As the undertaking has not been carried out owing to circumstances beyond the control of the parties, the payer can recover on the ground of *causa data causa non secuta*, subject to the recipient being able to set off any expenses reasonably incurred in respect of the undertaking. See *Cantiare San Rocco* (*S.A.*) v. *Clyde Shipbuilding and Engineering Co.* (1924), A.C. 226.

[2] *eum certioraverit*, i.e. within the time specified.

[3] *propter poenitentiam.* See note 3, p. 35, *supra* This is sometimes described as *condictio ex poenitentia* but the phrase is not classical. The action can be either for compensation or for the slave. The slave can be returned as he is still a slave, the manumission being ineffective when performed without the authority of the master. See D. 40. 2. 4 pr.

[4] I.e. when the specified time has elapsed.

[5] *constitutio.* I.e. the Constitution of Marcus Aurelius (see D. 40. 8. 1), which provided that a slave alienated in order that he might be manumitted should become free by operation of law so soon as the time had expired within which manumission ought to have taken place.

si quis dederit Titio decem, ut servum emat et manumittat, deinde poeniteat, si quidem nondum emptus est, poenitentia dabit condictionem, si hoc ei manifestum fecerit, ne si postea emat, damno adficietur: si vero iam sit emptus, poenitentia non facit iniuriam ei qui redemit, sed pro decem quae accepit ipsum servum quem emit restituet aut, si ante decessisse proponatur, nihil praestabit, si modo per eum factum non est. quod si fugit nec culpa eius contigit qui redemit, nihil praestabit: plane repromittere eum oportet, si in potestatem suam pervenerit, restitutum iri. (3) Sed si accepit pecuniam ut servum manumittat isque fugerit prius quam manumittatur, videndum, an condici possit quod accepit. et si quidem distracturus erat hunc servum et propter hoc non distraxit, quod acceperat ut manumittat, non oportet ei condici: plane cavebit, ut, si in potestatem suam pervenerit servus, restituat id quod accepit eo minus, quo vilior servus factus est propter fugam. plane si adhuc eum manumitti

anyone has given Titius ten (*aurei*) to buy a slave and manumit him, and subsequently changes his mind, if indeed the slave has not yet been bought, the change of mind will give a right to bring a *condictio*, provided he makes this clear to Titius, lest he buy the slave subsequently and thereby incur loss: on the other hand, if the slave has already been purchased, the change of mind does no wrong to the person who made the purchase, but instead of the ten (*aurei*) which he received, he will deliver over the slave which he purchased, or, if the supposition is that the slave has previously died, he will be under no liability, assuming always that the death was not caused by his fault. Also, if the slave has run away and this has happened without any fault on the part of the person who bought him, the latter will not be liable for anything: at the same time it is clear that he is bound to undertake that the slave shall be handed over, if he come into his power. (3) But if he has received money to manumit a slave, and the latter has run away before he is manumitted, we must consider whether a *condictio* can be maintained to recover what he has received. Now, if he had intended to sell this slave and refrained from selling him because he had received money to manumit him, a *condictio* ought not to lie against him; but it is clear that he must give security that, if the slave comes into his power, he will restore what he has received, subject to a deduction of the amount by which the slave has depreciated in value in consequence of his

velit is qui dedit, ille vero manumittere nolit propter fugam offensus, totum quod accepit restituere eum oportet. sed si eligat is, qui decem dedit, ipsum servum consequi, necesse est aut ipsum ei dari aut quod dedit restitui. quod si distracturus non erat eum, oportet id quod accepit restitui, nisi forte diligentius cum habiturus esset, si non accepisset ut manumitteret: tunc enim non est aequum eum et servo et toto pretio carere. (4) Sed ubi accepit, ut manumitteret, deinde servus decessit, si quidem moram fecit manumissioni, consequens est, ut dicamus refundere eum quod accepit: quod si moram non fecit, sed cum profectus esset ad praesidem vel apud quem manumittere posset, servus in itinere decesserit, verius est, si quidem distracturus erat vel quo ipse usurus, oportere dici nihil eum refundere debere. enimvero si nihil eorum facturus, ipsi adhuc servum obisse: decederet enim et si non accepisset

running away. Obviously, if the man who gave the money still desires him to be manumitted, but the other is unwilling to manumit, being angry because of his flight, the latter must restore the whole of the amount he has received. But if the man who gave the ten (*aurei*) elects to claim the slave himself, then, either the slave must be transferred to him or the money which he gave restored. If, however, the owner of the slave had not intended to sell him, what he received must be restored, unless, perhaps, he would have kept him more carefully if he had not received money to manumit him; for in that case it is not equitable that he should lose both the slave and the whole of the price.[1] (4) But suppose the case where he received the money to manumit the slave and then the slave died; in these circumstances, if at any rate he has been guilty of delay in effecting the manumission, it follows that we must say that he must refund what he has received: on the other hand, if he has not been guilty of delay, but (for example) when he had set out to appear before the *praeses* or other magistrate before whom the manumission could be effected, and the slave died in the course of the journey, it is the more correct view that, if in fact he had intended to sell the slave or to use him himself for any purpose, we must say that he need not refund anything. If, on the other hand, he had no intention to do any of these things, the slave died whilst still at his risk; for he would have died even though his master had not received the money to

[1] *nisi forte diligentius...carere.* This is probably interpolated.

ut manumitteret: nisi forte profectio manumissionis gratia morti causam praebuit, ut vel a latronibus sit interfectus, vel ruina in stabulo oppressus, vel vehiculo obtritus, vel alio quo modo, quo non periret, nisi manumissionis causa proficiscceretur.

6. IDEM libro tertio disputationum. Si extraneus pro muliere dotem dedisset et pactus esset, ut, quoquo modo finitum esset matrimonium, dos ei redderetur, nec fuerint nuptiae secutae, quia de his casibus solummodo fuit conventum qui matrimonium sequuntur, nuptiae autem secutae non sint, quaerendum erit, utrum mulieri condictio an ei qui dotem dedit competat. et verisimile est in hunc quoque casum eum qui dat sibi prospicere: nam quasi causa non secuta habere potest condictionem, qui ob matrimonium dedit, matrimonio non copulato, nisi forte evidentissimis probationibus mulier ostenderit hoc eum ideo fecisse, ut ipsi magis mulieri quam sibi prospiceret. sed et si pater pro filia det et ita convenit, nisi evidenter aliud actum sit, condictionem patri competere Marcellus ait.

manumit him; unless perchance the journey for the purpose of manumission gave occasion to his death, as, for instance, if he was killed by robbers, or crushed by the fall of something in a tavern, or run over by a vehicle, or killed in some other way in which he would not have been killed if he had not been on the journey for the purpose of manumission.

6. The same (Disputationes, 3). If a stranger had given a *dos* on behalf of a woman and had made a pact that, in whatever way the marriage should come to an end, the *dos* should be restored to him, but the marriage did not take place, since the agreement made had reference only to events which are consequent on a marriage but a marriage did not follow, the question arose whether the *condictio* is open to the woman, or to the party who gave the *dos*. And it is probable that in this case also[1] the man who gives the *dos* intends to secure his own interest: for a person who has given in contemplation of marriage can, if the marriage has not been consummated, bring a *condictio*, as if on the ground of failure of purpose, unless perhaps the woman shews by the clearest proofs that his object in doing this was to benefit her rather than himself. And even if a father gives a *dos* on behalf of his daughter and a pact of

[1] I.e. in case no marriage took place.

7. IULIANUS libro sexto decimo digestorum. Qui se debere pecuniam mulieri putabat, iussu eius dotis nomine promisit sponso et solvit: nuptiae deinde non intercesserunt: quaesitum est, utrum ipse potest repetere eam pecuniam qui dedisset, an mulier. Nerva, Atilicinus responderunt, quoniam putasset quidem debere pecuniam, sed exceptione doli mali tueri se potuisset, ipsum repetiturum. sed si, cum sciret se nihil mulieri debere, promisisset, mulieris esse actionem, quoniam pecunia ad eam pertineret. si autem vere debitor fuisset et ante nuptias solvisset et nuptiae secutae non fuissent, ipse possit condicere, causa debiti integra mulieri ad hoc solum manente, ut ad nihil aliud debitor compellatur, nisi ut cedat ei condicticia actionc. (1) Fundus dotis nomine traditus, si nuptiae insecutae non fuerint, condictione repeti potest: fructus quoque condici poterunt. idem iuris est de ancilla et partu eius.

this description is made, Marcellus says that the *condictio* is available to the father, unless an intention to the contrary is clear.

7. Julianus (Digesta, 16). A person, who believed that he owed a sum of money to a woman, by her order made a formal promise to her betrothed to pay the money to him by way of *dos*, and accordingly paid it; afterwards the marriage did not take place; the question was asked whether the person who paid the money or the woman is the person entitled to bring an action for its recovery. Nerva and Atilicinus were of opinion that since he only believed that he owed the money and could have protected himself (if he had been sued for it) by an *exceptio doli mali*, he can himself recover it. But if he had promised, knowing that he owed the woman nothing, the right of action would be the woman's, because the money would belong to her.[1] If, however, he had really been her debtor and had paid by way of antenuptial gift, and the marriage had not ensued, he can himself bring the *condictio*, the liability in respect of the debt to the woman remaining unaffected to this extent only, that the debtor is compellable to nothing else than merely to cede his claim to her by *actio condicticia*.[2] (1) Land delivered by way of

[1] When he promised knowing that he did not owe the money and afterwards paid it, he, in effect, made a gift thereof on the woman's behalf as part of her *dos*.

[2] The expression *actio condicticia*, which is not classical, points to interpolation here and in other passages where it occurs in the text.

8. NERATIUS libro secundo membranarum. Quod Servius in libro de dotibus scribit, si inter eas personas, quarum altera nondum iustam aetatem habeat, nuptiae factae sint, quod dotis nomine interim datum sit, repeti posse, sic intellegendum est, ut, si divortium intercesserit, priusquam utraque persona iustam aetatem habeat, sit eius pecuniae repetitio, donec autem in eodem habitu matrimonii permanent, non magis id repeti possit, quam quod sponsa sponso dotis nomine dederit, donec maneat inter eos adfinitas: quod enim ex ea causa nondum coito matrimonio datur, cum sic detur tamquam in dotem perventurum, quamdiu pervenire potest, repetitio eius non est.

9. PAULUS libro septimo decimo ad Plautium. Si donaturus mulieri iussu eius sponso numeravi nec nuptiae secutae sunt, mulier condicet. sed si ego contraxi cum sponso et pecuniam in hoc dedi, ut, si nuptiae secutae essent, mulieri dos adquireretur, si non essent secutae, mihi redderetur, quasi ob rem datur

dos can, if the marriage does not take place, be recovered by *condictio*;[1] fruits also can be claimed by *condictio*. The rule is the same in respect of a female slave and her offspring.

8. Neratius (Membranae, 2). With regard to what Servius writes in his book *De Dotibus*, that if a marriage has taken place between persons, either of whom has not yet attained the lawful age, whatever has been given by way of *dos* can be recovered, the statement must be understood to mean that, if a divorce takes place before both the parties have attained the lawful age, there can be recovery of the money; but so long as they continue in the same condition of matrimony, the money can no more be reclaimed than can gifts made by a betrothed woman to her intended husband by way of *dos*, so long as the relation of betrothal between them continues: for whatever is given for that purpose before the marriage takes place, seeing that it is given in such terms that it is to become a part of the *dos*, cannot be reclaimed so long as it is possible for it to take effect as a dotal provision.

9. Paulus (on Plautius, 17). If I was about to give money to a woman and by her direction paid it to her betrothed husband, but the marriage did not take place, the woman will have the *condictio* for the money.[2] But if I contracted with the betrothed husband and gave him the money for this purpose, namely,

[1] Cf. D. 13. 3. 1.

[2] Cf. h.t. 7 pr.

et re non secuta ego a sponso condicam. (1) Si quis indebitam pecuniam per errorem iussu mulieris sponso eius promisisset et nuptiae secutae fuissent, exceptione doli mali uti non potest: maritus enim suum negotium gerit et nihil dolo facit nec decipiendus est: quod fit, si cogatur indotatam uxorem habere. itaque adversus mulierem condictio ei competit, ut aut repetat ab ea quod marito dedit aut ut liberetur, si nondum solverit. sed si soluto matrimonio maritus peteret, in eo dumtaxat exceptionem obstare debere, quod mulier receptura esset.

10. IAVOLENUS libro primo ex Plautio. Si mulier ei cui nuptura erat cum dotem dare vellet, pecuniam quae sibi debebatur acceptam fecit neque nuptiae insecutae sunt, recte ab eo pecunia condicetur, quia nihil interest, utrum ex numeratione pecunia ad eum sine causa an per acceptilationem pervenerit.

that if the marriage ensued, it should be taken as *dos* for the woman, but if the marriage did not take place, it should be restored to me, it is, as it were, given for a particular purpose, and, the purpose failing, I can bring a *condictio* to recover it against the betrothed husband. (1) If anyone has, by mistake, promised a woman's betrothed husband, by her direction, a sum of money which is not owing, and the marriage has taken place, he cannot avail himself of the plea of *dolus malus* (if sued for the money): for the husband is acting on his own account and does nothing fraudulent and ought not to be misled to his detriment, as he would be if he were compelled to have a wife without a *dos*. Accordingly a *condictio* is available to the promisor against the woman,[1] to recover from her what he has given to the husband or to get a release, if he has not yet paid. If, however, the husband should sue for the money after the marriage has been dissolved, the exception (of *dolus malus*) should only avail as a bar to the extent to which the woman could have reclaimed the *dos*.[2]

10. Javolenus (on Plautius, 1). If a woman, intending to give a *dos* to a man whom she is about to marry, has given him a formal release in respect of a sum of money which he owed her, and then the marriage has not taken place, a *condictio* can properly be brought against him for the money, because it

[1] I.e. the *condictio indebiti*, not *c. data c. non secuta*.

[2] As to the wife's claim to the return of the *dos* on termination of the marriage, see B. p. 109.

11. IULIANUS libro decimo digestorum. Si heres arbitratu liberti certa summa monumentum iussus facere dederit liberto pecuniam et is accepta pecunia monumentum non faciat, condictione tenetur.

12. PAULUS libro sexto ad legem Iuliam et Papiam. Cum quis mortis causa donationem, cum convaluisset donator, condicit, fructus quoque donatarum rerum et partus et quod adcrevit rei donatae repetere potest.

13. MARCIANUS libro tertio regularum. Si filius contulerit fratri quasi adgniturus bonorum possessionem et non adgnovit, repetere eum posse Marcellus libro quinto digestorum scribit.

14. PAULUS libro tertio ad Sabinum. Si procuratori falso indebitum solutum sit, ita demum a procuratore repeti non

makes no difference whether it was by payment or by formal release that the money came to him without just ground of acquisition.[1]

11. Julianus (Digesta, 10). If an heir, directed to erect a monument according to the decision of a freedman to cost a certain sum, has given the money to the freedman, and the latter after receiving the money does not erect the monument, he is liable to a *condictio*.

12. Paulus (on the Lex Julia et Papia, 6). When the giver of a *donatio mortis causa*, having recovered from his illness, brings a *condictio* for its return, he can reclaim also the fruits of the things given and the offspring and any accession to the subject-matter of the gift.

13. Marcianus (Regulae, 3). If a son has brought property into community[2] for the benefit of his brother, intending to claim *bonorum possessio* and then has not claimed it, Marcellus states in the fifth book of his Digesta that he can reclaim it.

14. Paulus (on Sabinus, 3). If payment has been made of money not due to a person who falsely pretends to be *procurator*

[1] This implies that the *acceptilatio* is good, so that there is no longer an action on the original obligation. But as the release was given for a purpose which has failed there is a *condictio* to cancel the *acceptilatio*. The passage appears to be inconsistent with D. 23. 3. 43 pr., where Scaevola says that a release given *matrimonii causa* when the marriage does not take place is a nullity. Probably Scaevola refers to a conditional release "if the marriage takes place", Javolenus to an absolute release, but proved to be made for the purpose of providing a *dos*.

[2] I.e. an emancipated son, who could claim *bonorum possessio* on making *collatio bonorum*. See B. p. 325 and D. 37. 6.

potest, si dominus ratum habuerit, sed ipse dominus tenetur, ut Iulianus scribit. quod si dominus ratum non habuisset, etiamsi debita pecunia soluta fuisset, ab ipso procuratore repetetur: non enim quasi indebitum datum repetetur, sed quasi ob rem datum nec res secuta sit ratihabitione non intercedente: vel quod furtum faceret pecuniae falsus procurator, cum quo non tantum furti agi, sed etiam condici ei posse.

15. POMPONIUS libro vicensimo secundo ad Sabinum. Cum servus tuus in suspicionem furti Attio venisset, dedisti eum in quaestionem sub ea causa, ut, si id repertum in eo non esset, redderetur tibi: is eum tradidit praefecto vigilum quasi in facinore deprehensum: praefectus vigilum eum summo supplicio adfecit. ages cum Attio dare eum tibi oportere, quia et ante

for another, the only case in which an action will not lie to recover it from the *procurator* is when the (alleged) principal has ratified the transaction; but, in this case, as Julianus states, the principal is himself liable. But if the latter has not ratified, then, even if the money paid had been due, it can be reclaimed from the (pretended) *procurator* himself; for the claim to recover is not founded on the ground that the money was not owing, but on the ground that it was given for a purpose and the purpose was not fulfilled as no ratification took place; alternatively the claim may be put on the ground that the pretended *procurator* was guilty of theft of the money, and not only can an action of theft be brought against him, but he is also liable to a *condictio*.[1]

15. Pomponius (on Sabinus, 22). When your slave had been suspected by Attius of theft of his property, you handed him over to be put to the torture, subject to the condition that, if he was not found guilty of the theft, he should be restored to you:[2] Attius delivered him to the *Praefectus Vigilum* as one who had been caught in the act, and the *Praefectus Vigilum* inflicted the supreme penalty. You can bring an action against Attius

[1] If the payment was made with the intention that the money should belong to the agent, but that the principal's ratification should be obtained there will be a *c. causa data c. non secuta*, for it is given for a purpose which is not fulfilled. If the money was only given to be handed over to the principal and the pretended *procurator* keeps it, there is no passing of the property and therefore the action is not *causa data causa non secuta*, but there will be a *c. furtiva*. Cf. 47. 2. 43. 1.

[2] Not only possession but ownership is transferred to Attius with an agreement for reconveyance of the slave after his examination by torture, if it failed to establish his guilt.

mortem dare tibi eum oportuerit. Labeo ait posse etiam ad exhibendum agi, quoniam fecerit quo minus exhiberet. sed Proculus dari oportere ita ait, si fecisses eius hominem, quo casu ad exhibendum agere te non posse: sed si tuus mansisset, etiam furti te acturum cum eo, quia re aliena ita sit usus, ut sciret se invito domino uti aut dominum si sciret prohibiturum esse.

16. CELSUS libro tertio digestorum. Dedi tibi pecuniam, ut mihi Stichum dares: utrum id contractus genus pro portione emptionis et venditionis est an nulla hic alia obligatio est quam ob rem dati re non secuta? in quod proclivior sum: et ideo, si mortuus est Stichus, repetere possum quod ideo tibi dedi, ut

asserting an obligation to convey the slave to you, because even prior to the slave's death he was under an obligation to restore him to you.[1] Labeo maintains that an action *ad exhibendum* is also open to you, since he put it out of his power to produce the slave. But Proculus says that he is under an obligation to restore the slave only if you had transferred the ownership of the slave to him, in which case you cannot bring an action *ad exhibendum*; but if the slave had remained your property, you could have brought an action of theft also against him, seeing that he has used the property of another in a manner in which he knew the owner did not intend him to use it or in such a way that the owner, if he had known, would have forbidden.[2]

16. Celsus (Digesta, 3). I gave you money on the understanding that you were to give me Stichus: is this kind of contract to be considered as an instance of buying and selling or is the obligation here none other than one arising from something being given for a purpose followed by failure of such purpose? I am inclined to favour this latter view;[3] and, consequently, if Stichus has died, I can reclaim what I gave you in consideration of your giving Stichus to me.[4] Suppose the case where Stichus belonged to another person but you nevertheless delivered him

[1] Attius acted wrongfully when he delivered the slave to the *Praefectus Vigilum*, for that was a breach of the agreement. Either he had been examined and not found guilty or, by delivering him to the Prefect before examination, Attius prevented the examination taking place. The slave was delivered for a purpose and the purpose was not carried out.

[2] Cf. J. Inst. IV. 1. 6.

[3] Celsus argues that this is no sale because the contract is to transfer ownership and in sale the contract is only to give undisturbed possession "*licere habere*".

[4] There would be no recovery if the transaction were sale. J. Inst. III. 23. 3.

mihi Stichum dares. finge alienum esse Stichum, sed te tamen eum tradidisse: repetere a te pecuniam potero, quia hominem accipientis non feceris: et rursus, si tuus est Stichus et pro evictione eius promittere non vis, non liberaberis, quo minus a te pecuniam repetere possim.

to me: I shall be able to recover the money from you, because you have not made the slave the property of the receiver:[1] furthermore, if Stichus is your property and you are not willing to give a warranty against eviction, you will not be freed from the contingency of my recovering the money from you by action.[2]

[1] I.e. even prior to eviction. In sale mere want of title will not affect the contract. There must be actual eviction, or what is equivalent, before an *actio empti* would lie.

[2] I have a right to this security to assure the transfer of the *dominium* which you undertake to confer on me.

III. DE CONDICTIONE OB TURPEM VEL INIUSTAM CAUSAM

D. 12. 5

1. PAULUS libro decimo ad Sabinum. Omne quod datur aut ob rem datur aut ob causam, et ob rem aut turpem aut honestam: turpem autem, aut ut dantis sit turpitudo, non accipientis, aut ut accipientis dumtaxat, non etiam dantis, aut utriusque. (1) Ob rem igitur honestam datum ita repeti potest, si res, propter quam datum est, secuta non est. (2) Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest:

2. ULPIANUS libro vicensimo sexto ad edictum. ut puta dedi tibi ne sacrilegium facias, ne furtum, ne hominem occidas. in qua specie Iulianus scribit, si tibi dedero, ne hominem occidas,

Concerning the *condictio* on the ground of a dishonourable or illegal consideration.[1]

1. Paulus (on Sabinus, 10). Everything which is given is given either for a purpose (*ob rem*) or for a consideration (*ob causam*),[1] and for a purpose which may be either dishonourable or honourable: again, if the purpose be dishonourable, the turpitude may be on the part of the giver and not of the receiver, or on the part of the receiver only and not also of the giver, or it may be on the part of both. (1) In the case of a gift made for an honourable purpose, an action will only lie for its restoration if the purpose for which it was given has not been fulfilled.[2] (2) But if there was a dishonourable consideration on the part of the receiver[3] what has been given can be recovered, even though the purpose has been fulfilled.

2. Ulpianus (on the Edict, 26). Suppose, for instance, I have given you something in consideration that you do not commit sacrilege, or theft, or that you do not kill a man. With reference to this last instance, Julian states that if I have made

[1] I.e. for some purpose to be effected in the future or by reason of some ground of obligation already existing. The term "consideration" is here used in the sense of ground of obligation and not in the English technical sense of the word.

[2] Or has been fulfilled after the donor has, *ex poenitentia*, changed his mind and duly notified this before the dishonourable purpose has been carried out. Cf. D. 12. 4. 5. 1 and 2.

[3] The giver not being a party to it. See h.t. 3 *infra*.

condici posse: (1) Item si tibi dedero, ut rem mihi reddas depositam apud te vel ut instrumentum mihi redderes. (2) Sed si dedi, ut secundum me in bona causa iudex pronuntiaret, est quidem relatum condictioni locum esse: sed hic quoque crimen contrahit (iudicem enim corrumpere videtur) et non ita pridem imperator noster constituit litem eum perdere.

3. PAULUS libro decimo ad Sabinum. Ubi autem et dantis et accipientis turpitudo versatur, non posse repeti dicimus: veluti si pecunia detur, ut male iudicetur.

4. ULPIANUS libro vicensimo sexto ad edictum. Idem si ob stuprum datum sit, vel si quis in adulterio deprehensus redemerit se: cessat enim repetitio, idque Sabinus et Pegasus responderunt. (1) Item si dederit fur, ne proderetur, quoniam

a gift to you on the understanding that you will not kill a man, a *condictio* can be brought to recover it. (1) Likewise if I have given something to you to induce you to restore to me property deposited with you, or to deliver up a document. (2) But if I have made a gift to induce a *iudex* to decide in my favour in a case in which I have a good cause of action, it has indeed been stated that a *condictio* may be brought; but in this instance the giver also is guilty of an offence (for he is regarded as corrupting the judge), and not very long ago our Emperor enacted that he should lose his suit.[1]

3. Paulus (on Sabinus, 10). Where, however, there is dishonourable conduct both on the part of the giver and of the receiver, we say that the gift cannot be recovered; as, for instance, if money is given to obtain an unjust judgment.

4. Ulpianus (on the Edict, 26). The same rule holds where something has been given on account of debauchery, or if a man caught in the act of adultery has paid to obtain release; for (in such cases) no action lies for restitution, and Sabinus and Pegasus gave opinions to this effect.[2] (1) Likewise if a thief has

[1] I.e. his action against the *iudex* for recovery of what he has given to him. See C. 7. 49. 1. The suitor and *iudex* are equally in fault and therefore the claim cannot be maintained because "in pari causa possessor potior haberi debetur" (D. 50. 17. 128). Cf. D. 50. 17. 154 pr. and h.t. 8. The French Code has departed from this principle in cases of official corruption. See Planiol, vol. II, p. 286.

[2] This may appear to be inconsistent with D. 4. 2. 7. 1, but is not really so. The explanation is that an adulterer who freely pays money to secure immunity cannot recover it; but if the money is paid under the influence of intimidation it can be recovered: but, in classical law, the action would be *quod metus causa* and not *condictio*.

utriusque turpitudo versatur, cessat repetitio. (2) Quotiens autem solius accipientis turpitudo versatur, Celsus ait repeti posse: veluti si tibi dedero, ne mihi iniuriam facias. (3) Sed quod meretrici datur, repeti non potest, ut Labeo et Marcellus scribunt, sed nova ratione, non ea, quod utriusque turpitudo versatur, sed solius dantis: illam enim turpiter facere, quod sit meretrix, non turpiter accipere, cum sit meretrix. (4) Si tibi indicium dedero, ut fugitivum meum indices vel furem rerum mearum, non poterit repeti quod datum est: nec enim turpiter accepisti. quod si a fugitivo meo acceperis ne eum indicares, condicere tibi hoc quasi furi possim: sed si ipse fur indicium a me accepit vel furis vel fugitivi socius, puto condictionem locum habere.

5. IULIANUS libro tertio ad Urseium Ferocem. Si a servo

made a gift to avoid being betrayed, since both parties are guilty of dishonourable conduct, there is no action for restitution. (2) But whenever the dishonourable conduct is on the part of the receiver alone, Celsus says that an action for restitution can be brought; as, for instance, if I have made a gift to you to induce you to refrain from committing a wrongful act against me. (3) But what is given to a harlot cannot be reclaimed, as Labeo and Marcellus state; but on a different principle, that is, not for the reason that there is immoral conduct on the part of both parties, but because there is on the part of the giver alone; for the woman acts immorally in being a harlot, but being such, she does not act immorally in receiving the gift. (4) If I have given you a reward[1] to discover my fugitive slave or the thief of my property, what has been given cannot be recovered; for there was nothing dishonourable in your receiving it. But if you have received a gift from my fugitive slave as an inducement not to give information about him, I can bring a *condictio* against you as a thief:[2] and so too if the actual thief, or the accomplice of a thief or of a fugitive slave, received from me a reward for information, I am of opinion that a *condictio* can be brought.[3]

5. Julianus (on Urseius Ferox, 3). If any one has received

[1] *indicium* = reward for informing of a crime or other offence (Heumann-Seckel). *praemium delationis* (Dirksen).

[2] I can bring a *c. furtiva*, for as you knew the slave was a fugitive, you also knew that he was giving you the money of whoever should prove to be his master.

[3] In this case the *condictio* is *ob turpem causam*. He must not be allowed to derive profit from his own wrongdoing.

meo pecuniam quis accepisset, ne furtum ab eo factum indicaret, sive indicasset sive non, repetitionem fore eius pecuniae Proculus respondit.

6. ULPIANUS libro octavo decimo ad Sabinum. Perpetuo Sabinus probavit veterum opinionem existimantium id, quod ex iniusta causa apud aliquem sit, posse condici: in qua sententia etiam Celsus est.

7. POMPONIUS libro vicensimo secundo ad Sabinum. Ex ea stipulatione, quae per vim extorta esset, si exacta esset pecunia, repetitionem esse constat.

8. PAULUS libro tertio quaestionum. Si ob turpem causam promiseris Titio, quamvis, si petat, exceptione doli mali vel in factum summovere eum possis, tamen si solveris, non posse te repetere, quoniam sublata proxima causa stipulationis, quae propter exceptionem inanis esset, pristina causa, id est turpitudo, superesset: porro autem si et dantis et accipientis turpis causa

money from my slave to induce him not to give information of a theft committed by the slave, then, whether he gave information or not, according to an opinion of Proculus, an action will lie for the return of the money.[1]

6. Ulpianus (on Sabinus, 18). Sabinus always approved the opinion of the early jurists, who held that a *condictio* can be brought to recover what is in anyone's hands for a consideration which is unlawful. And Celsus is of this opinion also.

7. Pomponius (on Sabinus, 22). When the payment of money has been enforced as due under a stipulation which had been extorted by violence, it is settled that an action will lie for its recovery.

8. Paulus (Quaestiones, 3). If you have promised something to Titius for an immoral consideration, although, if he sues for it, you can defeat him by an *exceptio doli* or an *exceptio in factum*,[2] nevertheless if you have paid, you cannot recover, because the immediate ground of liability, viz. the stipulation, which would be unenforceable because of the *exceptio*, being removed, the original ground, that is, the immoral consideration, would still survive; moreover, if the immoral consideration is imputable

[1] Here the money can be claimed by *vindicatio* if it can be identified and has not been spent. If it has been spent the remedy will be a *condictio*.

[2] *exceptio in factum*, framed to meet the circumstances of the case. See B. pp. 656–7, and Girard, p. 1095, n. 4.

sit, possessorem potiorem esse et ideo repetitionem cessare, tametsi ex stipulatione solutum est.

9. IDEM libro quinto ad Plautium. Si vestimenta utenda tibi commodavero, deinde pretium, ut reciperem, dedissem, condictione me recte acturum responsum est: quamvis enim propter rem datum sit et causa secuta sit, tamen turpiter datum est. (1) Si rem locatam tibi vel venditam a te vel mandatam ut redderes pecuniam acceperis, habebo tecum ex locato vel vendito vel mandati actionem: quod si, ut id, quod ex testamento vel ex stipulatu debebas, redderes mihi, pecuniam tibi dederim, condictio dumtaxat pecuniae datae eo nomine erit. idque et Pomponius scribit.

to both the giver and the receiver, the person in possession should be preferred,[1] and, consequently, there is no action for recovery although payment was made in pursuance of the stipulation.

9. The same (on Plautius, 5). If I have lent you garments for use, and afterwards have paid you a price for their restoration, the opinion has been given that I can properly proceed against you by *condictio*, for although the money was given for a purpose and the purpose has been accomplished, still the money was given for a dishonourable consideration.[2] (1) If you have received money (from me) to induce you to hand over a thing which has been let on hire to you, or sold (to me) by you or entrusted to you under a mandate, I shall have against you an action *ex locato*, or *ex vendito*, or *mandati*[3] (as the case may be): but if I have given you money to induce you to hand over to me what you were owing in pursuance of the provisions of a testament or a stipulation, there will simply be a right to bring a *condictio* for the return of the money paid for that purpose.[4] And Pomponius also expresses himself to this effect.

[1] *possessorem potiorem esse.* Cf. 50. 17. 128 and h.t. 2. 2.

[2] *turpiter datum est.* The *causa* was *turpis* to the receiver of the money only and not to the payer, who was constrained to pay to get back his property. Hence he has a *condictio* to recover what he has paid.

[3] *habebo tecum ex locato etc.* This means that the plaintiff at his option resorts to the action on the contract, which being *bonae fidei* would allow of a claim for interest. As there has been a payment of a sum of money improperly obtained, the payer has the option to recover it by *condictio certi* or to have his claim adjusted in connection with an action on the contract.

[4] *dumtaxat* does not signify that you have no remedy except the *condictio*. The arrangement of the sentence shews that Paul's meaning was that there was a *condictio* for the money only and that interest could not be claimed as would be the case in *bonae fidei* actions. Cf. C. 4. 7. 4.

IV. DE CONDICTIONE INDEBITI

D. 12. 6

1. ULPIANUS libro vicensimo sexto ad edictum. Nunc videndum de indebito soluto. (1) Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.

2. IDEM libro sexto decimo ad Sabinum. Si quis sic solverit, ut, si apparuisset esse indebitum vel Falcidia emerserit, reddatur, repetitio locum habebit: negotium enim contractum est inter eos. (1) Si quid ex testamento solutum sit, quod postea

Of the *condictio* for money paid which was not owing.

1. Ulpianus (on the Edict, 26). Now we must consider the case of the payment of money which was not owing. (1) And certainly if anyone has paid what was not owing in ignorance of the fact,[1] he can claim to recover it by this action: but if he has paid knowing that he did not owe the money, his claim to recover fails.[2]

2. The same (on Sabinus, 16). If a man has made a payment on condition that if it should prove not to be owing or that it is a case to which the *lex Falcidia* applies,[3] the money is to be returned, an action for recovery will lie: for there is a contract[4] between the parties. (1) If a payment has been made in pur-

[1] Ignorance of law was not in itself a ground for recovery. C. 1. 18. 10: "Si quis ius ignorans indebitam pecuniam solverit, cessat repetitio. per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est." Cf. D. 22. 6. 9 pr. and 2; C. 4. 5. 9. When, however, there is ignorance of law and also the supposed *causa* of the obligation was either non-existent or has ceased to have validity, a *condictio* will lie, but rather on the latter ground, i.e. that there has been a payment *sine causa*, than the former. H.t. 54.

[2] Cf. D. 50. 17. 53: "Cuius per errorem dati repetitio est, eius consulto dati donatio est." Also h.t. 50 and D. 22. 6. 6. See B. p. 542.

[3] I.e. if through the discovery of further debts due from the testator, the heir, after paying the legacies, finds that he has not retained the quarter of the inheritance to which he is entitled under the *lex Falcidia*.

[4] *negotium*. The *condictio indebiti* is based on quasi-contract, but in this case the claim is on a contract, for even if there is no stipulation, the *pactum adiectum* is part of the transaction. See D. 12. 1. 7.

falsum vel inofficiosum vel irritum vel ruptum apparuerit, repetetur, vel si post multum temporis emerserit aes alienum, vel codicilli diu celati prolati, qui ademptionem continent legatorum solutorum vel deminutionem per hoc, quia aliis quoque legata relicta sunt. nam divus Hadrianus circa inofficiosum et falsum testamentum rescripsit actionem dandam ei, secundum quem de hereditate iudicatum est.

3. PAPINIANUS libro vicensimo octavo quaestionum. Idem est et si solutis legatis nova et inopinata causa hereditatem abstulit, veluti nato postumo, quem heres in utero fuisse ignorabat, vel etiam ab hostibus reverso filio, quem pater obisse falso praesumpserat: nam utiles actiones postumo vel filio, qui hereditatem eviccrat, dari oportere in eos, qui legatum perceperunt, imperator Titus Antoninus rescripsit, scilicet quod

suance of a testament, which afterwards turns out to be forged, or inofficious, or void, or to have been annulled, it may be reclaimed; and this is also the case if a debt should come to light after a considerable time, or codicils, long undiscovered, should be produced which contain an ademption of legacies which have already been paid, or a diminution of them by reason of the fact that further legacies have been left to other persons.[1] For the late Emperor Hadrian, in a rescript on the subject of an inofficious or forged testament, laid down that the action is to be granted to the person to whom the right of inheritance has been adjudged to belong.[2]

3. Papinianus (Quaestiones, 28). The same rule applies also if, after the legacies have been paid, some new and unexpected event has taken away the inheritance; as, for instance, the birth of a posthumous child, whom the heir did not know to be conceived, or, again, the return of a son from the enemy, whom his father had erroneously assumed to be dead: for the Emperor, Titus Antoninus, laid down in a rescript that *utiles actiones* are to be granted to the posthumous child, or to the son who had succeeded in recovering the inheritance, against those persons who had received a legacy, on this principle, namely, that a possessor in good faith is liable to the extent to which he is made

[1] See also C. 4. 5. 7.

[2] This ruling was necessary, for the payment had not of necessity been made by the person who obtains the inheritance or by anyone else on his behalf. If the testament is set aside, the *heres scriptus*, who paid, cannot be considered to have been the agent of the *heres ab intestato*, as their interests are clearly adverse. Hence the latter is given a *utilis condictio indebiti*.

bonae fidei possessor in quantum locupletior factus est tenetur nec periculum huiusmodi nominum ad eum, qui sine culpa solvit, pertinebit.

4. PAULUS libro tertio ad Sabinum. Idem divus Hadrianus rescripsit et si aliud testamentum proferatur.

5. ULPIANUS libro sexto decimo ad Sabinum. Nec novum, ut quod alius solverit alius repetat. nam et cum minor viginti quinque annis inconsulte adita hereditate solutis legatis in integrum restituitur, non ipsi repetitionem competere, sed ei, ad quem bona pertinent, Arrio Titiano rescriptum est.

6. PAULUS libro tertio ad Sabinum. Si procurator tuus indebitum solverit et tu ratum non habeas, posse repeti Labeo

the richer, and that the risk of debts of this nature will not attach to the person who has made payments without being guilty of negligence.[1]

4. Paulus (on Sabinus, 3). The late Emperor Hadrian issued a rescript to the same effect for the case where another testament is produced.

5. Ulpianus (on Sabinus, 16). For it is no novel doctrine that one man may have a right to sue for the return of what another has paid. When, for instance, a person under twenty-five years of age, after making entry of an inheritance without taking proper advice and paying legacies, is granted a *restitutio in integrum*, then, it is provided in a rescript addressed to Arrius Titianus, that the right to sue for the return of the money accrues, not to him, but to the person to whom the property belongs.

6. Paulus (on Sabinus, 3). If your *procurator* pays money which you do not owe and you do not ratify his act, Labeo, in his books entitled *Posteriores*, has stated that he can recover what he has paid:[2] but if the money had been owing, Celsus

[1] *huiusmodi nominum*, i.e. the sums recoverable from legatees whose legacies fail through the will becoming invalid. The evicted heir ought properly to sue for them and restore the entire inheritance to the true heir, but to guard against possible loss from the inability of the legatees to repay the legacies, he is allowed to cede his actions to the true heir, who then sues at his own risk. The same principle is applied to payment to creditors in h.t. 19. 1. The recipients being *bona fide* possessors are only liable to the extent of enrichment—*in quantum locupletiores facti sunt*.

[2] The agent cannot recover what he has paid from you by an *actio mandati* because he has no authority to pay what is not owing: but he can bring a *condictio* on his own account against the person whom he has paid by mistake.

libris posteriorum scripsit: quod si debitum fuisset, non posse repeti Celsus: ideo, quoniam, cum quis procuratorem rerum suarum constituit, id quoque mandare videtur, ut solvat creditori, neque postea exspectandum sit, ut ratum habeat. (1) Idem Labeo ait, si procuratori indebitum solutum sit et dominus ratum non habeat, posse repeti. (2) Celsus ait eum, qui procuratori debitum solvit, continuo liberari neque ratihabitionem considerari: quod si indebitum acceperit, ideo exigi ratihabitionem, quoniam nihil de hoc nomine exigendo mandasse videretur, et ideo, si ratum non habeatur, a procuratore repetendum. (3) Iulianus ait neque tutorem neque procuratorem solventes repetere posse neque interesse, suam pecuniam an pupilli vel domini solvant.

says that it cannot be reclaimed; for this reason, that when a man has appointed some one to be *procurator* to deal with his affairs, he must be taken also impliedly to authorise him to pay a creditor, and it is not necessary to wait afterwards for ratification of the payment.[1] (1) On the same principle Labeo says that if payment of what is not owing has been made to a *procurator* and his principal does not ratify, the money can be reclaimed.[2] (2) Celsus says that a person who has paid to a *procurator* a debt (owing to his principal) is at once discharged, and ratification need not be considered: but if the *procurator* received what was not owing, ratification is required, because the principal is not supposed to have given any mandate as to the enforcement of this claim, and consequently, if there be no ratification, the money must be recovered from the *procurator*. (3) Julian says that neither a *tutor* nor a *procurator*, when they have paid money (in a representative capacity), can recover what they have paid, and that it is immaterial whether they have paid their own money or that of the *pupillus* or the principal (as the case may be).[3]

[1] The payment is not *indebitum* and moreover he has the *actio mandati* against his principal for reimbursement as the payment is within his implied authority.

[2] A *condictio* will lie against the agent. If the principal ratifies, the *condictio* will then of course be against him.

[3] The purport of this statement appears to be that when payment is made by an agent on the principal's behalf, the agent must sue in the principal's name and not in his own, unless the principal refuses to ratify, and that a tutor must sue in the pupil's name as the pupil cannot form a judgment as to whether he ought to ratify or not.

7. POMPONIUS libro nono ad Sabinum. Quod indebitum per errorem solvitur, aut ipsum aut tantundem repetitur.

8. PAULUS libro sexto ad Sabinum. Quod nomine mariti, qui solvendo non sit, alius mulieri solvisset, repetere non potest: adeo debitum esset mulieri.

9. ULPIANUS libro sexagensimo sexto ad edictum. Nam et maritus, si, cum facere nihil possit, dotem solverit, in ea causa est ut repetere non possit.

10. PAULUS libro septimo ad Sabinum. In diem debitor adeo debitor est, ut ante diem solutum repetere non possit.

11. ULPIANUS libro trigensimo quinto ad Sabinum. Si is, cum quo de peculio actum est, per imprudentiam plus quam in peculio est solverit, repetere non potest.

7. Pomponius (on Sabinus, 9). When what is not owing is paid by mistake, the claim to recover is either for the thing itself or its equivalent in value.

8. Paulus (on Sabinus, 6). When a third person has made a payment to a woman on behalf of her husband, who is insolvent, he cannot reclaim the money; for in any case it is a debt owing to the woman.[1]

9. Ulpianus (on the Edict, 66). For even the husband himself, if he has paid over the *dos* at a time when he is insolvent, is in the circumstances unable to reclaim it.[2]

10. Paulus (on Sabinus, 7). A person who is under an obligation to pay on a future day is regarded as a debtor to the extent that he is not able to reclaim what has been paid before the fixed day.[3]

11. Ulpianus (on Sabinus, 35). If a person, against whom an action *de peculio* has been brought, has inadvertently paid more than the value of the *peculium*, he cannot reclaim the overpayment.[4]

[1] The husband is under an obligation to repay the *dos* on the dissolution of the marriage, although he may avail himself of the *beneficium competentiae*. Hence a person who pays on the husband's behalf cannot have the *c. indebiti* to recover what he has paid in discharge of what at any rate is a natural obligation.

[2] If the husband pays in full without availing himself of the *beneficium competentiae*, he cannot recover as it is not a payment of what is not owing.

[3] Cf. h.t. 17 and 18 and note 2, p. 63 *infra*.

[4] It is difficult to reconcile this excerpt with what is stated in D. 15. 1. 47. 2; 13. 5. 1. 8; and 34. 3. 5. 2. These passages imply that there is no liability on the part of the master, edictal or natural, beyond the value of the *peculium*. The edictal liability of the master is distinct from the natural liability of the slave. See Buckland, *Roman Law of Slavery*, p. 217.

12. PAULUS libro septimo ad Sabinum. Si fundi mei usum fructum tibi dedero falso existimans me eum tibi debere et antequam repetam decesserim, condictio eius ad heredem quoque meum transibit.

13. IDEM libro decimo ad Sabinum. Naturaliter etiam servus obligatur: et ideo, si quis nomine eius solvat vel ipse manumissus, *vel*,[1] ut Pomponius scribit, ex peculio, cuius liberam administrationem habeat, repeti non poterit: et ob id et fideiussor pro servo acceptus tenetur et pignus pro eo datum tenebitur et, si servus, qui peculii administrationem habet, rem pignori in id quod debeat dederit, utilis pigneraticia reddenda est. (1) Item quod pupillus sine tutoris auctoritate mutuum accepit et locupletior factus est, si pubes factus solvat, non repetit.

14. POMPONIUS libro vicensimo primo ad Sabinum. Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem.

15. PAULUS libro decimo ad Sabinum. Indebiti soluti con-

12. Paulus (on Sabinus, 7). If I have given you the usufruct of my land under the false impression that it is legally due to you, and I die before bringing an action to recover it, the right to bring a *condictio* for it will pass to my heir also.

13. The same (on Sabinus, 10). A slave, it may be added, may be under a natural obligation: and therefore, if any one pays a debt on his account, or if he himself pays after he has been manumitted or,[1] as Pomponius tells us, pays out of the *peculium* of which he has the free administration no action will lie for the recovery of the money: and for this reason, a surety (*fideiussor*) accepted on the slave's behalf is bound and a pledge given on his account will be held good and, if a slave who has free administration of his *peculium* has given something by way of pledge as security for what he owes, an *actio utilis pigneraticia* must be granted (to redeem the pledge).[2] (1) Likewise if a *pupillus*, after attaining puberty, pays what he has received as a loan without the authorisation of his tutor and by which he has been enriched, he is not able to recover the payment.

14. Pomponius (on Sabinus, 21). For it is a principle of natural equity that no one should be enriched through loss falling on another.[3]

15. Paulus (on Sabinus, 10). The *condictio* to recover what

[1] *vel* is not in the MS but it is clearly required here.

[2] For *actio pigneraticia*, see B. p. 476.

[3] Cf. D. 50. 17. 206 and D. 23. 3. 6. 2.

dictio naturalis est et ideo etiam quod rei solutae accessit, venit in condictionem, ut puta partus qui ex ancilla natus sit vel quod alluvione accessit: immo et fructus, quos is cui solutum est bona fide percepit, in condictionem venient. (1) Sed et si nummi alieni dati sint, condictio competet, ut vel possessio eorum reddatur: quemadmodum si falso existimans possessionem me tibi debere alicuius rei tradidissem, condicerem. sed et si possessionem tuam fecissem ita, ut tibi per longi temporis praescriptionem avocari non possit, etiam sic recte tecum per indebitam condictionem agerem. (2) Sed et si usus fructus in re soluta alienus sit, deducto usu fructu a te condicam.

16. POMPONIUS libro quinto decimo ad Sabinum. Sub condicione debitum per errorem solutum pendente quidem condicione repetitur, condicione autem exsistente repeti non potest.

has been paid when it was not owing is an institution of natural law, and therefore any accession to the thing handed over in payment will also come within the scope of the *condictio*; for instance, the offspring born of a female slave or an increase by alluvion: moreover the fruits which the person to whom payment has been made has gathered in good faith also come within the scope of the action. (1) Again, even if coins belonging to another have been handed over, a *condictio* is available in order that the possession thereof at least may be restored; just as if, erroneously thinking that the possession of something was owing by me to you, I had delivered it to you, I could bring a *condictio* for it.[1] Furthermore, even if I had made the possession yours in such wise that through the operation of prescription the thing could not be recovered from you, I could nevertheless properly sue you by a *condictio indebiti*.[2] (2) So also, if a usufruct in the thing handed over by way of payment belongs to a third person, I can bring a *condictio* against you for the thing, making allowance for the usufruct.

16. Pomponius (on Sabinus, 15). When anything which is conditionally owing has been paid by mistake, it may certainly be recovered whilst the condition is still in suspense, but if the

[1] An instance of the employment of the *condictio* to recover possession. Cf. D. 12. 1. 4. 1; 13. 3. 2.

[2] *agerem*. In this latter case I bring a *condictio indebiti* for the property, not merely for possession. The possession only was *indebita* at first, but on completion of usucapion the property also can be claimed as *indebitum*, as resulting from the *indebita possessio*. Cf. D. 23. 3. 67 and D. 39. 6. 13 pr.

(1) Quod autem sub incerta die debetur, die exsistente non repetitur.

17. ULPIANUS libro secundo ad edictum. Nam si cum moriar dare promisero et antea solvam, repetere me non posse Celsus ait: quae sententia vera est.

18. IDEM libro quadragensimo septimo ad Sabinum. Quod si ea condicione debetur, quae omnimodo exstatura est, solutum repeti non potest, licet sub alia condicione, quae an impleatur incertum est, si ante solvatur, repeti possit.

19. POMPONIUS libro vicensimo secundo ad Sabinum. Si poenae causa eius cui debetur debitor liberatus est, naturalis obligatio manet et ideo solutum repeti non potest. (1) Quamvis

condition has come to pass, it cannot then be reclaimed. (1) Furthermore, what is due on a day which is uncertain cannot be reclaimed when the day has arrived.[1]

17. Ulpianus (on the Edict, 2). For if I have promised to give something when I die and I pay it before the event, Celsus says that I cannot reclaim it: and this opinion is sound.[2]

18. The same (on Sabinus, 47). But if a thing is due under a condition such as is sure to come to pass in any event, it cannot be recovered after payment has been made, although if the condition was of another description, such that it is uncertain whether it will be fulfilled or not, then if payment is made prematurely, it may be reclaimed.

19. Pomponius (on Sabinus, 22). If a debtor has been released[3] as a penalty on the person to whom the debt is owing, the natural obligation continues to exist, and, consequently, if the money is paid it cannot be recovered. (1) Although a man may receive what is really owing to him, yet if he who pays

[1] Another reading is "*non exsistente die repetitur*", i.e. can be recovered before the day arrives.

[2] At first sight this appears inconsistent with the previous extract (16. 1) which states that money due at an uncertain date can be recovered, if paid before the day is ascertained. But here the hypothesis is different. In 16. 1 Pomponius is speaking of a date purely uncertain, i.e. a day which may or may not arrive, so that it is clearly a condition: but in this extract Ulpian is speaking of a day which must necessarily arrive in due course, and the case is the same as that of a condition which must come to pass, i.e. is not really a condition properly so called. Hence 17 must be read in conjunction with 18. There is a case in point in D. 19. 2. 19. 6.

[3] I.e. by operation of law. For instance, payment of a loan made in contravention of the Sc. *Macedonianum*. See h.t. 40 pr. *infra*.

debitum sibi quis recipiat, tamen si is qui dat non debitum dat, repetitio competit: veluti si is qui heredem se vel bonorum possessorem falso existimans creditori hereditario solverit: hic enim neque verus heres liberatus erit et is quod dedit repetere poterit: quamvis enim debitum sibi quis recipiat, tamen si is qui dat non debitum dat, repetitio competit.[1] (2) Si falso existimans debere nummos solvero, qui pro parte alieni, pro parte mei fuerunt, eius summae partem dimidiam, non corporum condicam. (3) Si putem me Stichum aut Pamphilum debere, cum Stichum debeam, et Pamphilum solvam, repetam quasi indebitum solutum: nec enim pro eo quod debeo videor id solvisse. (4) Si duo rei, qui decem debebant, viginti pariter solverint, Celsus ait singulos quina repetituros, quia, cum decem deberent, viginti solvissent, et quod amplius ambo solverint, ambo repetere possunt.

gives what is not owing by him, an action to recover is available; as, for instance, if a person, erroneously believing himself to be heir or *bonorum possessor*, has paid a creditor of the inheritance: for in such case, the real heir will not be discharged from liability, and the person paying can recover what he has paid: for even though a man may receive what is really owing to him, nevertheless if he who pays gives what is not owing by him, recovery is allowed.[1] (2) If, erroneously believing that I owe a debt, I have paid coins, which partly belonged to another person and partly were my own, I can bring a *condictio* for half the amount, but not for a half of the actual coins. (3) If I believe I am bound to give Stichus or Pamphilus (at my option) when I am really bound to give Stichus, and I hand over Pamphilus, I can reclaim him as being handed over when not due; for I am not considered to have made this payment in place of what is really due from me. (4) If two debtors, who owed ten (*aurei*), have together paid twenty, Celsus says that each separately may recover five, because, seeing that they owed ten, they have paid twenty, and what both have paid in excess, both can reclaim.[2]

[1] *quamvis enim debitum.* This is a repetition of the sentence at the beginning of the extract. We must suppose that he pays *suo nomine*, imagining that he himself is the debtor. If he pays *alieno nomine*, on account of another person, he cannot recover; but he may have an *actio negotiorum gestorum* against the real debtor, i.e. assuming that he has paid what is owing by the person on whose behalf he made the payment.

[2] If they had paid at different times, the one who paid last would have the *c. indebiti*. See h.t. 25.

20. IULIANUS libro decimo digestorum. Si reus et fideiussor solverint pariter, in hac causa non differunt a duobus reis promittendi: quare omnia, quae de his dicta sunt, et ad hos transferre licebit.

21. PAULUS libro tertio quaestionum. Plane si duos reos non eiusdem pecuniae, sed alterius obligationis constitueris, ut puta Stichi aut Pamphili, et pariter duos datos, aut togam vel denaria mille, non idem dici poterit in repetitione ut partes repetant, quia nec solvere ab initio sic potuerunt, igitur hoc casu electio est creditoris, cui velit solvere, ut alterius repetitio impediatur.

22. POMPONIUS libro vicensimo secundo ad Sabinum. Sed et si me putem tibi aut Titio promisisse, cum aut neutrum factum sit aut Titii persona in stipulatione comprehensa non sit, et Titio solvero, repetere a Titio potero. (1) Cum iter

20. Julianus (Digesta, 10). If a principal debtor and his surety (*fideiussor*) have made payment at the same time, their position does not in the case under consideration differ from that of two promisors: consequently all that has been said about the latter may be applied to the former also.

21. Paulus (Quaestiones, 3). Clearly, if you have put two persons under an obligation, not in respect of the same sum of money, but in respect of some alternative subject-matter, as, for instance, to give Stichus or Pamphilus, and thereupon the two slaves are delivered simultaneously, or to deliver a toga or a thousand *denarii*, we cannot say the same, viz. that in an action for recovery, they recover separate portions, because they could not have made payment in this way originally. Consequently in this case the creditor can elect to which of them he will make restitution, so as to bar the action by the other.[1]

22. Pomponius (on Sabinus, 22). Again, if I think that I have promised something to you or Titius, whereas the promise was made to neither, or Titius was not personally included in the stipulation, if I have paid Titius, I can reclaim the money from Titius. (1) In a case in which I ought to have reserved

[1] If a single debtor, under an obligation to pay one of two things, by mistake paid both he could elect which should be restored to him: C. 4. 5. 10. Here it is assumed that the joint debtors have paid different things and the creditor can elect to which of them he will make restitution, unless, as is unlikely, the debtors agree between themselves as to whom it shall be made.

excipere deberem, fundum liberum per errorem tradidi: incerti condicam, ut iter mihi concedatur.

23. ULPIANUS libro quadragensimo tertio ad Sabinum. Eleganter Pomponius quaerit, si quis suspicetur transactionem factam vel ab eo cui heres est vel ab eo cui procurator est et quasi ex transactione dederit, quae facta non est, an locus sit repetitioni. et ait repeti posse: ex falsa enim causa datum est. idem puto dicendum et si transactio secuta non fuerit, propter quam datum est: sed et si resoluta sit transactio, idem erit dicendum. (1) Si post rem iudicatam quis transegerit et solverit, repetere poterit idcireo, quia placuit transactionem nullius esse momenti: hoc enim imperator Antoninus cum divo patre suo rescripsit. retineri tamen atque compensari in causam iudicati, quod ob talem transactionem solutum est, potest. quid ergo si appellatum sit vel hoc ipsum incertum sit, an iudicatum sit vel

a right of way, I delivered land by mistake as free from servitude: I can bring a *condictio incerti* claiming that the right of way shall be granted to me.[1]

23. Ulpianus (on Sabinus, 43). Pomponius appropriately raises the following question: if a person is under the impression that a compromise[2] has been made either by one to whom he is heir or by one for whom he is *procurator*, and hands over something in pursuance of the supposed compromise, which in fact was never made, is an action for recovery available? And he says that an action can be brought, as the thing was handed over on a false assumption. The same, I think, should be said, if a compromise on account of which something has been given has failed to take effect; also if the compromise has been set aside the same must be said. (1) If anyone has entered into a compromise after judgment has been given and has paid accordingly, he can recover, for the reason that such a compromise is of no effect: for the Emperor Antoninus and his late father laid this down in a rescript. But a payment made in pursuance of such a compromise may be retained and may be set off in an action on the judgment. What shall we say then if an appeal has been lodged or it be itself a matter of uncertainty whether a judgment has been given or whether a decision is valid? It is the prevailing opinion that the compromise holds good: for it must be supposed

[1] Cf. h.t. 12 and D. 13. 3. 1. This is one of the few examples of the *condictio incerti*, but it is not at all clear why it should be *incerti*.

[2] For *transactio*, see B. p. 525.

an sententia valeat? magis est, ut transactio vires habeat: tunc enim rescriptis locum esse credendum est, cum de sententia indubitata, quae nullo remedio adtemptari potest, transigitur. (2) Item si ob transactionem alimentorum testamento relictorum datum sit, apparet posse repeti quod datum est, quia transactio senatus consulto infirmatur. (3) Si quis post transactionem nihilo minus condemnatus fuerit, dolo quidem id fit, sed tamen sententia valet. potuit autem quis, si quidem ante litem contestatam transegerit, volenti litem contestari opponere doli exceptionem: sed si post litem contestatam transactum est, nihilo minus poterit exceptione doli uti post secuti: dolo enim facit, qui contra transactionem expertus amplius petit. ideo condemnatus repetere potest, quod ex causa transactionis dedit. sane quidem ob causam dedit neque repeti solet quod ob causam datum est causa secuta: sed hic non videtur causa secuta, cum transactioni non stetur. cum igitur repetitio oritur,

that the rescripts apply only when a compromise is made with reference to a decision of undoubted validity, which cannot be attacked by any form of legal process. (2) Likewise if anything has been given by way of compromise for aliment bequeathed in a testament, it is clear that what has been given may be reclaimed, because the compromise is avoided by a *senatus-consultum*.[1] (3) If a party, after a compromise has been effected, has nevertheless been condemned in an action, this is certainly fraudulent, but still the judgment is valid. But a party, if indeed he has made a compromise before *litis contestatio*, could set up an *exceptio doli* against a plaintiff desiring to proceed to *litis contestatio*: and if the compromise was arranged after *litis contestatio*, he could nevertheless employ the exception of subsequent fraud: for a man acts fraudulently who proceeds with his action in spite of a compromise and still asserts his claim. Consequently the defendant on being condemned can recover what he has given on account of the compromise. It is indeed true that he gave it for a purpose and what has been given for a purpose cannot, as a rule, be recovered when the purpose has been fulfilled: but, in this case, the purpose does not appear to have been fulfilled, seeing that the compromise is not adhered to. When therefore a claim for recovery of what was given arises,

[1] *senatusconsultum*. This is set out in D. 2. 15. 8. It embodies an *oratio* of the Emperor Marcus.

transactionis exceptio locum non habet: neque enim utrumque debet locum habere et repetitio et exceptio. (4) Si qua lex ab initio dupli vel quadrupli statuit actionem, dicendum est solutum ex falsa eius causa repeti posse.

24. IDEM libro quadragensimo sexto ad Sabinum. Si is, qui perpetua exceptione tueri se poterat, cum sciret sibi exceptionem profuturam, promiserit aliquid ut liberaretur, condicere non potest.

25. IDEM libro quadragensimo septimo ad Sabinum. Cum duo pro reo fideiussissent decem, deinde reus tria solvisset et postea fideiussores quina, placuit eum qui posterior solvit repetere tria posse: hoc merito, quia tribus a reo solutis septem sola debita supererant, quibus persolutis tria indebita soluta sunt.

26. IDEM libro vicensimo sexto ad edictum. Si non sortem quis, sed usuras indebitas solvit, repetere non poterit, si sortis debitae solvit: sed si supra legitimum modum solvit, divus

the exception on the ground of the compromise is not applicable; for it is not proper that both an action for recovery and also the exception should be available. (4) If in any case a law has provided an action for two-fold or four-fold at the outset,[1] it may be said that what has been paid under an erroneous impression that the law is applicable may be reclaimed.

24. The same (on Sabinus, 46). If a man, who was able to protect himself by a perpetual *exceptio*, has promised something in order to obtain a release, knowing that the *exceptio* was available to him, he cannot bring a *condictio*.[2]

25. The same (on Sabinus, 47). When two persons had become sureties for a debtor for ten (*aurei*), and the debtor afterwards had paid three and subsequently the sureties five each, it was held that the surety who paid last could recover three; and this is right, because three having been paid by the debtor, only seven remained due, and when these had been paid, three were paid which were not owing.

26. The same (on the Edict, 26). If a debtor has paid,

[1] *ab initio*, i.e. where the action is for double or quadruple in any case, whether the claim is contested or not. In those cases in which *infitiando lis crescit*, a defendant paying is regarded as making a compromise and the money cannot be recovered even though the suit might have been successfully defended: J.Inst. 3. 27. 7; C. 4. 5. 4; Girard, p. 658.

[2] Cf. h t. 1. 1.

Severus rescripsit (quo iure utimur) repeti quidem non posse, sed sorti imputandum et, si postea sortem solvit, sortem quasi indebitam repeti posse. proinde et si ante sors fuerit soluta, usurae supra legitimum modum solutae quasi sors indebita repetuntur. quid si simul solverit? poterit dici et tunc repetitionem locum habere. (1) Supra duplum autem usurae et usurarum usurae nec in stipulatum deduci nec exigi possunt et solutae repetuntur, quemadmodum futurarum usurarum usurae. (2) Si quis falso se sortem debere credens usuras solverit, potest condicere nec videtur sciens indebitum solvisse. (3) Indebitum autem solutum accipimus non solum si omnino non debeatur, sed et si per aliquam exceptionem perpetuam peti non poterat:

not the principal, but interest which is not due,[1] he cannot recover if he has paid interest in respect of a principal debt which was due; but if he has paid beyond the lawful rate,[2] the late Emperor Severus laid down in a rescript (and this rule we follow at the present day) that although the interest cannot be recovered, it is nevertheless to be credited towards payment of the principal and, if he afterwards has paid the principal, the principal (to the extent of the over-payment) may be recovered as if it were not due. Similarly, even if the principal has been paid first, interest above the lawful rate[2] may be recovered as if it were principal money not due. But what if he has paid them at one and the same time? It may be said that in that case also an action to recover is available. (1) Interest, however, in excess of double the principal sum, and compound interest, can neither be made the subject of a stipulation nor be exacted;[3] and, if paid, may be reclaimed, in the same way as interest on future interest can be recovered. (2) If a man, under an erroneous belief that he owes a principal sum, has paid interest, he can bring a *condictio* and is not considered to have knowingly paid what he did not owe. (3) Moreover we hold that a payment is made of what is not owing, not only when it is not owing at all, but also if no action could be maintained for it because of some perpetual *exceptio*:[4] hence in this case also money paid

[1] *usuras indebitas*, i.e. where there had been no stipulation for interest or actionable pact made at the time of the loan, but a subsequent informal agreement or understanding under which it would be equitable that interest should be paid. Cf. C. 4. 32. 3; D. 46 3. 102. 3.

[2] Cf. C. 4. 32. 26. 1. For statutory regulation of interest, see B. pp. 464–5, 549–50, and Girard, p. 550, n. 2.

[3] See C. 4. 32. 27. 1.

[4] Cf. Vat. Frag. 266.

quare hoc quoque repeti poterit, nisi sciens se tutum exceptione solvit. (4) Si centum debens, quasi ducenta deberem, fundum ducentorum solvi, competere repetitionem Marcellus libro vicensimo digestorum scribit et centum manere stipulationem: licet enim placuit rem pro pecunia solutam parere liberationem, tamen si ex falsa debiti quantitate maioris pretii res soluta est, non fit confusio partis rei cum pecunia (nemo enim invitus compellitur ad communionem), sed et condictio integrae rei manet et obligatio incorrupta: ager autem retinebitur, donec debita pecunia solvatur. (5) Idem Marcellus ait, si pecuniam debens oleum dederit pluris pretii quasi plus debens, vel cum olcum deberet, oleum dederit quasi maiorem modum debens, superfluum olei esse repetendum, non totum et ob hoc peremptam esse obligationem. (6) Idem Marcellus adicit, si, cum fundi

may be recovered unless the person making the payment did so knowing that he was protected by the *exceptio*. (4) If, owing one hundred, I have delivered in payment a plot of land worth two hundred, under the impression that I owed two hundred, Marcellus states in the twentieth book of his *Digesta* that an action lies for recovery,[1] and that the stipulation for one hundred remains binding: for although it has been held that a thing given in payment in lieu of money operates as a discharge,[2] nevertheless, if in consequence of a mistake as to the amount of the debt, a thing of greater value is given by way of payment, there is no identification of part of the thing with money[3] (for no one is compelled against his will to become an owner in common with another), but a *condictio* continues to be available to recover the whole thing and the obligation remains unaffected: the land, however, will be retained until the money owing is paid.[4] (5) Marcellus also states that if, when owing money, a man has given oil of a higher value under the impression that he owes more,[5] or, when he was owing oil, has given oil under the impression that he owed a larger quantity, the excess of the oil may be recovered, but not the whole, and, that being so, the obligation has been discharged. (6) Likewise Marcellus adds that if, when a part of an estate was due to me and a valuation

[1] I.e. of the land (*fundi*).

[2] D. 13. 5. 1. 5.

[3] D. 50. 17. 84 pr.

[4] The creditor may retain the land *qua* pledge until the debt is paid. This appears inconsistent with the previous statement and is probably an interpolation. Cf. h.t 23. 1.

[5] The creditor must have agreed to receive payment in oil at a valuation.

pars mihi deberetur, quasi totus deberetur aestimatione facta, solutio pecuniae solidi pretii fundi facta sit, repeti posse non totum pretium, sed partis indebitae pretium. (7) Adeo autem perpetua exceptio parit condictionem, ut Iulianus libro decimo scripsit, si emptor fundi damnaverit heredem suum, ut venditorem nexu venditi liberaret, mox venditor ignorans rem tradiderit, posse eum fundum condicere: idemque et si debitorem suum damnaverit liberare et ille ignorans solverit. (8) Qui filio familias solverit, cum esset eius peculiaris debitor, si quidem ignoravit ademptum ei peculium, liberatur: si scit et solvit, condictionem non habet, quia sciens indebitum solvit. (9) Filius familias contra Macedonianum mutuatus si solverit et patri suo heres effectus velit vindicare nummos, exceptione summovebitur a vindicatione nummorum. (10) Si quis quasi ex compromisso condemnatus falso solverit, repetere potest.

had been made on the basis of the whole being due, a payment of money had been made of the price of the estate as a whole, there can be recovery not of the whole price, but of the price of the part of the estate which was not due. (7) Moreover so settled is the rule that a perpetual *exceptio* is a ground for a *condictio*, that Julian has stated in his tenth book that if the purchaser of an estate has charged his heir to release the vendor from his obligation under the contract of sale, and the vendor subsequently, not knowing this, has delivered the property, he can bring a *condictio* to recover it: and the case is the same if he has charged the heir to release his debtor, and the latter, not knowing the fact, has paid.[1] (8) A person who has made payment to a *filiusfamilias*, when he was his debtor in respect of the latter's *peculium*, is discharged if he was unaware that the *peculium* had been taken away from him: but if he knows this and pays, he has not a *condictio* because he has knowingly paid what is not owing. (9) If a *filiusfamilias*, having borrowed money in contravention of the *Sc. Macedonianum*,[2] has repaid it, and afterwards, having become heir to his father, desires to claim by *vindicatio* the coins he has paid, he will be barred by an *exceptio* from claiming the coins. (10) If a man has paid money by mistake under the impression that an award has been

[1] See h.t. 26. 3 *supra* and Vat. Frag. 266. The vendor in the former case and the debtor in the latter would have been able to raise the *exceptio doli*, if sued.

[2] For the *Sc. Macedonianum*, see B. p. 465.

(11) Hereditatis vel bonorum possessori, si quidem defendat hereditatem, indebitum solutum condici poterit: si vero is non defendat, etiam debitum solutum repeti potest. (12) Libertus cum se putaret operas patrono debere, solvit: condicere eum non posse, quamvis putans se obligatum solvit, Iulianus libro decimo digestorum scripsit: natura enim operas patrono libertus debet. sed et si non operae patrono sunt solutae, sed, cum officium ab eo desideraretur, cum patrono decidit pecunia et solvit, repetere non potest. sed si operas patrono exhibuit non officiales, sed fabriles, veluti pictorias vel alias, dum putat se debere, videndum an possit condicere. et Celsus libro sexto digestorum putat eam esse causam operarum, ut non sint

made against him based on a compromise, he can reclaim it. (11) A *condictio* to recover what has been paid when not owing can be brought against the heir or the *bonorum possessor*, if he defends his title to the inheritance; but if he does not defend, what has been paid, even though owing (to the inheritance), may be recovered.[1] (12) A freedman, believing that he was under an obligation to render services to his patron,[2] discharged them: Julian, in the tenth book of his *Digesta*, stated that he could not bring a *condictio*, even though he discharged the services in the belief that he was under a legal obligation to do so; for a freedman is under a natural obligation to render services to his patron. But even if the services were not rendered to the patron, but the freedman, when the discharge of a duty was demanded from him, compounded for a sum of money and paid it, he cannot recover. Supposing however he has performed services which are not matters of personal duty but matters of handicraft,[3] as, for instance, painting or the like,

[1] The rule is the same when payment is made to a person supposed to be an agent, but not really so: C. 4. 5. 8.

[2] I.e. under the impression that he was bound by a special promise, by *iusiurandum* or stipulation, to render them. There would be a natural obligation even without a promise.

[3] *non officiales, sed fabriles.* The *operae* of a freedman were either *officiales* or *fabriles*. *Officiales* were those which had relation to the person of the patron, e.g. to attend him at his house, accompany him to the forum, and the like. *Fabriles* were those which consisted in the performance of actual work, and which could be measured in money value. A freedman was bound to render *op. officiales*, whether he expressly promised to do so or not: *op. fabriles*, on the other hand, were only due by reason of express promise. *Op. officiales*, being due to the person of the patron, could not be claimed by the heirs of the patron, but *op. fabriles* could be assigned by the patron in his lifetime and were due to his heirs after his death.

eaedem neque eiusdem hominis neque eidem exhibentur: nam plerumque robur hominis, aetas temporis opportunitasque naturalis mutat causam operarum, et ideo nec volens quis reddere potest. sed hae, inquit, operae recipiunt aestimationem: et interdum licet aliud praestemus, inquit, aliud condicimus: ut puta fundum indebitum dedi et fructus condico: vel hominem indebitum, et hunc sine fraude modico distraxisti, nempe hoc solum refundere debes, quod ex pretio habes: vel meis sumptibus pretiosiorem hominem feci, nonne aestimari haec debent?

at the same time thinking he was under a legal obligation to perform them, in this case we must consider whether or not he can bring a *condictio*. And Celsus, in the sixth book of his *Digesta*, states his opinion to be that the grounds on which services may be due are such that the services are not always the same, and the same services are neither always due from the same individual nor due to the same patron: for very often the physical strength of a man, his age, and the natural fitness of the occasion vary the ground for the demand of services, and so a man may not be able to render them although he is willing to do so. But these services, says he, admit of a valuation; and sometimes, although we hand over one thing we bring a *condictio* for another; for instance, I have handed over an estate which was not due and I bring a *condictio* for the fruits; or I have handed over a slave who was not due and you, without any fraud, have sold him for a small sum; of course, in this case, you are bound only to refund what you still have out of the price;[1] or I have made a slave more valuable at my own expense; are not these cases in which a valuation must be made? So too in the case under consideration, he says, a *condictio* may be brought for the amount which I should have to pay to hire the services. But the question is raised by Marcellus, in the twentieth book of his *Digesta*, as to what the position is supposing the freedman has been assigned by his patron to render his official services to another.[2] And Marcellus says that he is

[1] *hoc solum refundere debes*. Where the recipient deals with the thing *bona fide*, he is liable only to the extent of his enrichment. The suggestion here is that the recipient has disposed of the thing in good faith (*sine fraude*) and is liable only to the extent to which he has benefited, viz. the fruits in one case and the price of the slave in the other. Hence where services are rendered by mistake, the recipient is liable only for the value of the services to him, i.e. what he would pay to hire the services.

[2] Beck reads *in officiales operas*. Mitteis would omit *officiales operas* after *patrono*. The text gives evidence of considerable modification.

sic et in proposito, ait, posse condici, quanti operas essem conducturus. sed si delegatus sit a patrono officialcs operas,[1] apud Marcellum libro vicensimo digestorum quaeritur. et dicit Marcellus non teneri eum, nisi forte in artificio sint (hae enim iubente patrono et alii edendae sunt): scd si solverit officiales delegatus, non potest condicere neque ei cui solvit creditori, cui alterius contemplatione solutum est quique suum recipit, neque patrono, quia natura ei debentur. (13) Si decem aut Stichum stipulatus solvam quinque, quaeritur, an possim condicere: quaestio ex hoc descendit, an liberer in quinque: nam si liberor, cessat condictio, si non liberor, erit condictio. placuit autem, ut Celsus libro sexto et Marcellus libro vicensimo digestorum scripsit, non peremi partem dimidiam obligationis ideoque eum, qui quinque solvit, in pendenti habendum, an liberaretur, petique ab eo posse reliqua quinque aut Stichum et, si praestiterit residua quinque, videri eum et priora debita solvisse, si

not bound to render them, unless possibly they may be matters of handicraft[2] (for these must be rendered to another also if the patron so directs): but if the assigned freedman has discharged official services, he cannot bring a *condictio*, either against the person for whom, as creditor of his patron, he performed them, the services having been performed with a view to the benefit of another (i.e. the patron), who only receives his due; or against the patron, because they are owing to him by natural law. (13) If, having become bound by a stipulation for "ten (*aurei*) or Stichus", I pay five, the question arises whether I can bring a *condictio* (for the return of the five): the question depends on this, whether I am discharged to the extent of five: for if I am discharged, a *condictio* does not lie; if I am not discharged, a *condictio* is available. It has been held, however, as Celsus has stated in the sixth book of his *Digesta* and Marcellus in the twentieth book of his, that the half of an obligation cannot be extinguished, and therefore that the question whether the person who has paid the five should be discharged must be considered to be in suspense; and that "the remaining five or Stichus" may be claimed from him, whereupon, if he pays the remaining five, he is considered to have paid the former five

[1] See note 2 on p. 73.

[2] *nisi forte in artificio sint*, i.e. unless they are *fabriles*, and therefore not *officiales*. This looks like an unnecessary interpolation by a later hand.

autem Stichum praestitisset, quinque cum posse condicere quasi indebita. sic posterior solutio comprobabit, priora quinque utrum debita an indebita solverentur. sed et si post soluta quinque et Stichus solvatur et malim ego habere quinque et Stichum reddere, an sim audiendus, quaerit Celsus. et putat natam esse quinque condictionem, quamvis utroque simul soluto mihi retinendi quod vellem arbitrium daretur. (14) Idem ait et si duo heredes sint stipulatoris, non posse alteri quinque solutis alteri partem Stichi solvi: idem et si duo sint promissoris heredes. secundum quae liberatio non contingit, nisi aut utrique quina aut utrique partes Stichi fuerunt solutae.

27. PAULUS libro vicensimo octavo ad edictum. Qui loco certo debere existimans indebitum solvit, quolibet loco repetet: non enim existimationem solventis eadem species repetitionis sequitur.

also as part of the debt, but if he hands over Stichus, he can bring a *condictio* for the five (already paid) as not being owing. Thus his later payment will determine whether the first five were paid as being owing or not owing. But if, after the five have been paid, Stichus is also handed over, and I prefer to have the five and to restore Stichus, is my claim to be entertained? asks Celsus. And he is of opinion that a *condictio* has arisen for five, although if both were handed over at the same time a choice would be given to me to retain which I pleased.[1] (14) The same writer says also that if there are two heirs of the stipulator, it is not possible after paying five to one of them, to discharge the liability to the other by giving a share of Stichus; and the rule is the same if there are two heirs of the promisor. Accordingly the debt is not discharged unless five are paid to each or a share of Stichus is given to each.

27. Paulus (on the Edict, 28). A person who has paid what is not owing under the impression that it was due at a particular place, may reclaim it in any place he chooses: for the claim to

[1] Cf. D. 31. 1. 19. Here the receiver of the slave and money changes his character, and from being a creditor on a contract, having a right to claim one or other alternative, he becomes liable on a quasi-contract for the return of the alternative payment of five which had not satisfied the obligation. Papinian and Julian held, somewhat illogically, that the debtor could elect which should be returned, because he had a right to elect which he would pay, and this view was adopted by Justinian: C. 4. 5. 10.

28. IDEM libro trigensimo secundo ad edictum. Iudex si male absolvit et absolutus sua sponte solverit, repetere non potest.

29. ULPIANUS libro secundo disputationum. Interdum persona locum facit repetitioni, ut puta si pupillus sine tutoris auctoritate vel furiosus vel is cui bonis interdictum est solverit: nam in his personis generaliter repetitioni locum esse non ambigitur. et si quidem exstant nummi, vindicabuntur, consumptis vero condictio locum habebit.

30. IDEM libro decimo disputationum. Qui invicem creditor idemque debitor est, in his casibus, in quibus compensatio locum non habet, si solvit, non habet condictionem veluti indebiti soluti, sed sui crediti petitionem.

31. IDEM libro primo opinionum. Is, qui plus quam here-

recover is not subject to the same limitations as were supposed to exist by the payer.[1]

28. The same (on the Edict, 32). If a *iudex* has wrongfully granted absolution and the person absolved has voluntarily paid, he cannot recover.[2]

29. Ulpianus (Disputationes, 2). Sometimes personal status furnishes a ground for a claim to recover; as, for instance, if a *pupillus* without his tutor's authorisation, or a lunatic, or a person who has been interdicted from the management of his property, has made a payment: for there is no question that in the case of these persons there is, as a general rule, ground for an action to recover what has been paid. Accordingly, if the coins can be identified, they may be claimed by a *vindicatio*; but if they have been spent, a *condictio* will lie.

30. The same (Disputationes, 10). When a man is both creditor and debtor of the same person, then, in those cases in which set-off is not allowed,[3] if he has paid, he has no *condictio* as having paid what was not owing, but has merely a right of action for his own debt.

31. The same (Opiniones, 1). An heir, who by mistake has given security to pay a creditor of the inheritance more than his

[1] The obligation is quasi-contractual and therefore does not expose the plaintiff to the risk of *plus petitio* in claiming at another place, as in the case of a contract to pay at a particular place.

[2] He could avail himself of the *exceptio rei iudicatae* if sued, but as he pays freely, he cannot recover: h.t. 26. 3. *Sponte sua* means with knowledge that he was able to use the exception.

[3] As to *compensatio*, see B. pp. 703–7.

ditaria portio efficit per errorem creditori caverit, indebiti promissi habet condictionem.

32. IULIANUS libro decimo digestorum. Cum is qui Pamphilum aut Stichum debet simul utrumque solverit, si, posteaquam utrumque solverit, aut uterque aut alter ex his desiit in rerum natura esse, nihil repetet: id enim remanebit in soluto quod superest. (1) Fideiussor cum paciscitur, ne ab eo pecunia petatur, et per imprudentiam solverit, condicere stipulatori poterit et ideo reus quidem manet obligatus, ipse autem sua exceptione tutus est. nihil autem interest, fideiussor an heres eius solvat: quod si huic fideiussori reus heres extiterit et solverit, nec repetet et liberabitur. (2) Mulier si in ea opinione sit, ut credat se pro dote obligatam, quidquid dotis nomine dederit, non repetit: sublata enim falsa opinione relinquitur

portion of the inheritance warrants, has a *condictio* to cancel the promise of what was not due from him.[1]

32. Julianus (Digesta, 10). When a man, who is under an obligation to give Stichus or Pamphilus, has handed over both of them at the same time in payment, then, if after he has handed over both, either both or one of them has ceased to exist, he can recover nothing; for the survivor will remain in discharge of the obligation.[2] (1) When a surety makes an agreement that the money is not to be claimed from him, and inadvertently pays it, he can bring a *condictio* against the stipulator, and so the principal debtor indeed remains bound, but the surety himself is protected by the *exceptio* arising from the agreement.[3] Moreover it does not matter whether the surety himself pays or whether his heir does so: if, however, the principal debtor should become heir to the surety and pay the money, he cannot recover, but will be discharged from his obligation. (2) If a woman's view of her position is such that she believes that she is under an obligation to provide a *dos*, she cannot reclaim anything which she may have given by way of *dos*; for, her false impression having been removed, there remains the inducement of family duty, and by reason of this

[1] From C. 4. 9. 2 it appears that the appropriate *condictio* here is *c. sine causa*, but the excerpt is inserted in this title, because the giving of needless security is closely analogous to the payment of an *indebitum*. This is one of the few examples of the *condictio incerti*.

[2] If payment had not been made, the loss would fall on the debtor, who must in such event give the other slave: D. 18. 1. 34. 6.

[3] Cf. h.t. 26. 3.

pietatis causa, ex qua solutum repeti non potest. (3) Qui hominem generaliter promisit, similis est ei, qui hominem aut decem debet: et ideo si, eum existimaret se Stichum promisisse, eum dederit, condicet, alium autem quemlibet dando liberari poterit.

33. IDEM libro trigensimo nono digestorum. Si in area tua aedificassem et tu aedes possideres, condictio locum non habebit, quia nullum negotium inter nos contraheretur: nam is, qui non debitam pecuniam solverit, hoc ipso aliquid negotii gerit: cum autem aedificium in area sua ab alio positum dominus occupat, nullum negotium contrahit. sed et si is, qui in aliena area aedificasset, ipse possessionem tradidisset, condictionem non habebit, quia nihil accipientis faceret, sed suam rem

what has been paid cannot be recovered.[1] (3) A man who has promised a slave in general terms is in a similar position to one who owes a slave or ten (*aurei*); consequently if, under the impression that he had promised the slave, Stichus, he has handed him over, he may bring a *condictio* (for his return) and can discharge his obligation by giving any other slave he pleases.[2]

33. The same (Digesta, 39). If I have built on a site belonging to you and you obtain possession of the building, a *condictio* will not lie, because no legal relation[3] would arise between us: for he who has paid money which is not owing, by this very fact does something which implies a contractual relation: but when the owner of a site takes possession of a building erected thereon by another person, he incurs no contractual liability. Moreover, even if the man who had built on another man's ground had himself delivered up possession of it, he will not have a *condictio*, because he would not make anything

[1] I.e. the provision of the *dos* would be regarded as being made under a natural obligation although there was no legal liability.

[2] Cf. h.t. 26. 13. The man who promises *a* slave without specifying any particular slave can give any slave he pleases. The case is like that stated in h.t. 26. 13 where there is a promise of ten *aurei* or Stichus or ten *aurei* or an unspecified slave. But D. 31. 1. 19 suggests that once payment is made, there is no recovery, the debtor's option being gone. The present passage appears at variance with D. 31. 1. 19 but may perhaps be reconciled by assuming that it refers to an error of fact, the promisor thinking he had engaged to give Stichus when in reality he had only promised *a* slave, while D. 31. 1. 19 refers to a case where the debtor delivers Stichus, a more valuable slave than Pamphilus, in error of law, supposing he is bound to give the better slave.

[3] *nullum negotium*. For the significance of the term "negotium" see B. p. 180, and also Buckland and McNair, *Roman and English Law*, p. 254.

dominus habere incipiat. et ideo constat, si quis, cum existimaret se heredem esse, insulam hereditariam fulsisset, nullo alio modo quam per retentionem impensas servare posse.

34. IDEM libro quadragensimo digestorum. Is cui hereditas tota per fideicommissum relicta est et practerea fundus, si decem dedisset heredi, et heres suspectam hereditatem dixerit et eam ex Trebelliano restituerit, causam dandae pecuniae non habet, et ideo quod eo nomine quasi implendae condicionis gratia dederit, condictione repetet.

35. IDEM libro quadragensimo quinto digestorum. Qui ob rem non defensam solvit, quamvis postea defendere paratus est, non repetet quod solverit.

the property of the receiver, but the owner merely commences to have the enjoyment of his own property. Hence it is admitted that if a man, believing that he is the heir, has shored up a block of buildings belonging to the inheritance, he can secure payment of his expenses in no other way than by retention.[1]

34. The same (Digesta, 40). A man to whom the whole of an inheritance has been left by *fideicommissum*, and in addition a plot of land on condition of his giving ten (*aurei*) to the heir, when the heir has declared the inheritance of doubtful solvency and has handed it over under the *Sc. Trebellianum*, has no reason for giving the money, and consequently may reclaim by *condictio* whatever he may have given in respect of the plot as purporting to be in fulfilment of the condition.[2]

35. The same (Digesta, 45). A party who has made payment because the suit has not been defended,[3] cannot reclaim what he has paid, although subsequently he is prepared to defend the suit.

[1] This statement appears at variance with 40. 1 *infra* and with D. 30. 1. 60, but the opposition is only superficial. Both these passages refer to an heir who is in lawful possession of the subject-matter of a legacy or *fideicommissum*, even as against the person to whom it becomes his duty to transfer. Here the possession is not lawful against the true owner and although the *bona fide possessor* may have an *exceptio*, there is no *condictio*. He may possibly, if the work done was absolutely necessary, have an action *negotiorum gestorum*.

[2] The heir who makes entry on the inheritance against his will can claim a secondary *fideicommissum* which is charged on a primary *fideicommissarius*, if not given to him as being heir; but here the ten *aurei* are given him *qua* heir and as the whole inheritance, including the field, has been handed over under the *Sc. Trebellianum*, if the *fideicommissarius* has paid anything erroneously supposing that he is bound by the condition, he can recover what he has paid as *indebitum*.

[3] I.e. the defendant has made payment in pursuance of a stipulation *iudicatum solvi*. Cf. J. Inst. 4. 11. 4; D. 46. 7. 6.

36. PAULUS libro quinto epitomarum Alfeni digestorum. Servus cuiusdam insciente domino magidem commodavit: is cui commodaverat pignori eam posuit et fugit: qui accepit non aliter se redditurum aiebat, quam si pecuniam accepisset: accepit a servulo et reddidit magidem: quaesitum est, an pecunia ab eo repeti possit. respondit, si is qui pignori accepisset magidem alienam scit apud se pignori deponi, furti eum se obligasse ideoque, si pecuniam a servulo accepisset redimendi furti causa, posse repeti: sed si nescisset alienam apud se deponi, non esse furem, item, si pecunia eius nomine, a quo pignus acceperat, a servo ei soluta esset, non posse ab eo repeti.

37. IULIANUS libro tertio ad Urseium Ferocem. Servum meum insciens a te emi pecuniamque tibi solvi: eam me a te repetiturum et eo nomine condictionem mihi esse omnimodo puto, sive scisses meum esse sive ignorasses.

36. Paulus (Epitomae of the Digesta of Alfenus, 5). Someone's slave, without his master's knowledge, lent a dish: the person to whom he had lent it gave it in pledge and absconded; the person who received it in pledge said that he would return it only if he received his money: he received the money from the slave and returned the dish: the question was raised whether the money could be reclaimed from him. The answer was that if the person who received the dish in pledge knew that another person's dish was being deposited with him as a pledge, he had made himself liable for theft, and therefore, if he had received money from the slave by way of redemption of the stolen article, it could be recovered: but if he did not know that another person's property had been deposited with him, he is no thief, and further, if the money had been paid to him by the slave on account of the person from whom he took the pledge, it cannot be recovered from him.[1]

37. Julianus (on Urseius Ferox, 3). I bought from you a slave of my own, not knowing that he was mine, and paid you the money: I think that in any case the money may be reclaimed

[1] If the pledgee knew that the dish was not the pledgor's he is guilty of *furtum*. The *condictio* in such case would lie to recover the money not only as being not owing but also as paid *ob turpem causam*. See D. 12. 5. 9 pr. If the pledgee is acting *bona fide*, then the money paid to him is not *indebitum* when paid on account of the pledgor. Apparently the person responsible to the owner of the dish would be the pledgor on whose behalf the slave pays from his *peculium*.

38. AFRICANUS libro nono quaestionum. Frater a fratre, cum in eiusdem potestate essent, pecuniam mutuatus post mortem patris ei solvit: quaesitum est, an repetere possit. respondit utique quidem pro ea parte, qua ipse patri heres exstitisset, repetiturum, pro ea vero, qua frater heres exstiterit,

and that I have a *condictio* in respect of it, whether you knew that the slave was mine or were ignorant of the fact.[1]

38. Africanus (Quaestiones, 9). One brother having borrowed money from another at a time when they were both in the same *potestas*, paid it to him after the death of the father: the question was raised as to whether he can reclaim it. The answer was that he can certainly reclaim it to an extent proportionate to the share in which he himself was heir to the father; but as to the part proportionate to the share in which his brother was heir, this could be reclaimed only if a sum not less in amount had come to his brother out of his (the borrower's) *peculium*:[2] for the natural obligation which had previously

[1] The sale is in any case void because a man cannot purchase his own property. If you did not know the slave was mine, I claim by the *condictio indebiti*; if you did know, there is a *c. furtiva*. D 13. 1. 18 and D. 47. 2. 44 pr.

[2] The *peculium* of a son forms part of the paternal inheritance and therefore has to be shared with the co-heirs unless specially bequeathed to the son as a legacy. In the case in the text, the sons ought to have returned their *peculia* to the *hereditas* and then divided in proportion to their shares as heirs. It is clear that the result would have been the same, whether the debt of the one brother to the other was paid or not paid before the return of the *peculia*. But here it is supposed that the debt is paid by the one to the other after a division of the inheritance. the result is that the shares of the brothers in the inheritance are made unequal, differing obviously by twice the amount of the debt which has been paid. Can the brother who has paid recover the payment as *indebitum*? The debt was really a debt due to the father and devolves on the brothers as co heirs: there is therefore, at any rate, a *c. indebiti* for the half of the debt to which the payer is entitled as co heir. But Julian adds that there is also a *c. indebiti* as to the other half as well, for the debtor brother, if he had paid his debt before the return of the *peculia*, would have contributed to the inheritance his *peculium* less the amount of the debt, and would have received one half of the inheritance on the final division, hence the creditor brother has already been paid by the needless excess of the *peculium* contributed by the debtor. But if the debtor had no *peculium* or was insolvent as to his *peculium*, then the creditor brother retains the second half or so much of it as measures the amount by which his share of the inheritance would have been augmented, if the debtor had borrowed money to make repayment of his debt prior to the return of the *peculia* and division of the inheritance This is equitable, for in that case the creditor brother has not been paid either legally or naturally.

ita repetiturum, si non minus ex peculio suo ad fratrem pervenisset: naturalem enim obligationem quae fuisset hoc ipso sublatam videri, quod peculii partem frater sit consecutus, adeo ut, si praelegatum filio eidemque debitori id fuisset, deductio huius debiti a fratre ex eo fieret. idque maxime conscquens esse ei sententiae, quam Iulianus probaret, si extraneo quid debuisset et ab eo post mortem patris exactum esset, tantum iudicio eum familiae erciscundae reciperaturum a coheredibus fuisse, quantum ab his creditor actione de peculio consequi potuisset. igitur et si rc integra familiae erciscundae agatur, ita peculium dividi acquum essc, ut ad quantitatem eius indemnis a coherede praestetur: porro cum, quem adversus extraneum defendi oportet, longe magis in eo, quod fratri debuisset, indemnem esse praestandum. (1) Quaesitum est, si pater filio crediderit isque emancipatus solvat, an repetere possit. respondit, si nihil

existed would appear to have been extinguished by the very fact that his brother has obtained a portion of his (the borrower's) *peculium*; so much so that if the *peculium* had been bequeathed as a prelegacy to the son who was debtor, a deduction of this debt from it might be made by the brother. And this is an obvious consequence of an opinion which Julian approved, that if he (i.e. the brother who has borrowed) had owed something to a stranger, and payment had been enforced against him after his father's death, he would have a right to recover from his co-heirs, in an action *familiae erciscundae*, the amount which the creditor could have obtained from them by an action *de peculio*. Hence too, if resort is had to the action *familiae erciscundae* before any claim is made,[1] it would be in accordance with equity that the *peculium* should be so divided that in respect of his proportion of the debt[2] he should be guaranteed by his co-heir: moreover, one who ought to be protected against a stranger, should much more be guaranteed in respect of a debt which he owed to a brother. (1) The question has been raised whether, if a father has lent money to a son and the

[1] *re integra*, i.e. before the creditor has taken proceedings against the heir who is indebted to him. In the case discussed in the preceding extract the partition of the inheritance has been made without allowing for a debt due from one of the co-heirs. Here the discussion is as to what is to be done if the debt is taken into consideration at the time of partition.

[2] *eius*, i.e. the portion of the debt recoverable from the co-heir by an action *de peculio* brought by the creditor.

ex peculio apud patrem remanserit, non repetiturum: nam manere naturalem obligationem argumento esse, quod extraneo agente intra annum de peculio deduceret pater, quod sibi filius debuisset. (2) Contra si pater quod filio debuisset eidem emancipato solverit, non repetet: nam hic quoque manere naturalem obligationem eodem argumento probatur, quod, si extraneus intra annum de peculio agat, etiam quod pater ei debuisset computetur. eademque erunt et si extraneus heres exheredato filio solverit, id quod ei pater debuisset. (3) Legati satis accepi et cum fideiussor mihi solvisset, apparuit indebitum fuisse legatum: posse eum repetere existimavit.

39. MARCIANUS libro octavo institutionum. Si quis, cum a fideicommissario sibi cavere poterat, non caverit, quasi in-

latter repays it after emancipation, he can reclaim it. The answer was that if no part of the *peculium* has remained in the father's hands, he cannot reclaim:[1] for that the natural obligation continues is proved by the fact that if a stranger brings an action *de peculio* within the year,[2] the father could deduct what the son owed to him. (2) Conversely, if the father has paid to his son after emancipation what he owed to the latter (before emancipation) he cannot reclaim: for that the natural obligation subsists in this case also is proved by the same argument, seeing that if a stranger brings an action *de peculio* within the year, the debt which the father owed to the son will also be taken into account.[3] The same principles will apply if an *extraneus heres* has paid to a disinherited son what his father had owed him. (3) I took security for the payment of a legacy and after the surety (*fideiussor*) had paid me, it turned out that the legacy was not due; the view taken was that the surety could recover.[4]

39. Marcianus (Institutiones, 8). If a man, when he was able to require security to be given to him by a *fideicommissarius*, has failed to do so, the late Emperors Severus and Antoninus have laid down in a rescript that he can reclaim as if it were not

[1] If the father had retained the *peculium* or any part of it, the amount retained would be the measure of what the son could reclaim as *indebitum*.

[2] *intra annum*. The action *de peculio* could be brought while the son was *in potestate* and for one year afterwards. D. 15. 2. 1. pr.

[3] I.e. account is taken of this as well as of what is actually in the father's hands.

[4] He must have paid *suo nomine*. If he paid *alieno nomine*, on behalf of his principal, he would have an *actio mandati* against the principal and the principal a *c. indebiti* against the receiver of the money. See h.t. 47 *infra*.

debitum plus debito eum solutum repetere posse divi Severus et Antoninus rescripserunt.

40. IDEM libro tertio regularum. Qui exceptionem perpetuam habet, solutum per errorem repetere potest: sed hoc non est perpetuum. nam si quidem eius causa exceptio datur cum quo agitur, solutum repetere potest, ut accidit in senatus consulto de intercessionibus: ubi vero in odium eius cui debetur exceptio datur, perperam solutum non repetitur, veluti si filius familias contra Macedonianum mutuam pecuniam acceperit et pater familias factus solverit, non repetit. (1) Si pars domus, quae in diem per fideicommissum relicta est, arserit ante diem fideicommissi cedentem et eam heres sua impensa refecerit, de-

owing what he has paid in excess of what was due from him.[1]

40. The same (Regulae, 3). A man to whom a perpetual *exceptio* is available can reclaim what he has paid in error: but this does not hold good in all cases. For if indeed the *exceptio* is granted in the interest of the defendant, he can reclaim what he has paid, as is the case under the *senatusconsultum* concerning guarantees:[2] but where the *exceptio* is granted by way of penalty on the person to whom the money is owing, what has been paid in error cannot be reclaimed;[3] for instance, if a *filiusfamilias* has borrowed money in contravention of the *Sc. Macedonianum*, and after becoming a *paterfamilias* has repaid it, he cannot recover what he has paid. (1) If part of a house, which has been left by *fideicommissum* to take effect from a certain day, has been burnt before the day of vesting of the *fideicommissum*, and the

[1] There are three cases in which the fiduciary may require the *fideicommissarius* to furnish security:

(1) When the gift is on a negative condition, i.e. that something shall not be done, e.g. not to go to Athens, the fiduciary when he hands over may require a *cautio Muciana*: D. 35. 1. 7 pr.

(2) When the heir hands over a portion of the inheritance to the *fideicommissarius*, he has a right to a stipulation *partis et pro parte* to protect him against loss in suits commenced or engagements made by him prior to the transfer: G. II. 254; D. 36. 1. 37.

(3) When a patron pays a trust bequest, he has a right to a *cautio* to save him from being so overcharged by payment of debts subsequently proved as to be left in possession of less than his proper share: G. III. 41, 42; D. 36. 1. 62.

In these cases the omission to take the *cautio* gives the fiduciary a right to recover what he has paid, or in the first two cases to bring a *condictio incerti* to enforce the giving of a *cautio*: D. 7. 5. 5. 1; 35. 3. 3. 10.

[2] I.e. the *Sc. Velleianum*.

[3] In such a case, an *obligatio naturalis* continues to exist.

ducendam esse impensam ex fideicommisso constat et, si sine deductione domum tradiderit, posse incerti condici, quasi plus debito dederit. (2) Si pactus fuerit patronus cum liberto, ne operae ab eo petantur, quidquid postea solutum fuerit a liberto, repeti potest.

41. NERATIUS libro sexto membranarum. Quod pupillus sine[1] tutoris auctoritate stipulanti promiserit solverit, repetitio est, quia nec natura debet.

42. ULPIANUS libro sexagensimo octavo ad edictum. Poenae non solent repeti, cum depensae sunt.

43. PAULUS libro tertio ad Plautium. Si quis iurasset se dare non oportere, ab omni contentione discedetur atque ita solutam pecuniam repeti posse dicendum est.

44. IDEM libro quarto decimo ad Plautium. Repetitio nulla est ab eo qui suum recepit, tametsi ab alio quam vero debitore solutum est.

heir has rebuilt it at his own expense, it is settled that the expense ought to be deducted from the *fideicommissum* and, if the heir has delivered the house without making the deduction, he can bring a *condictio incerti*, on the ground that he has, as it were, handed over more than was due.[2] (2) If a patron has made an agreement with his freedman that services shall not be demanded from him, any payment made subsequently by the freedman may be recovered.[3]

41. Neratius (Membranae, 6). Anything which a *pupillus* has paid, if he has done so in pursuance of a promise made to a stipulator without the authorisation of his tutor, gives rise to an action for recovery, because he is not bound even by natural law.

42. Ulpianus (on the Edict, 68). It is not customary to allow penalties to be recovered when they have been paid.

43. Paulus (on Plautius, 3). If a man has made oath that he is not under an obligation to give, there is an end of all dispute, and so it must be said that an action can be brought to recover money which has been paid.[4]

44. The same (on Plautius, 14). No action for recovery will

[1] *si sine* according to the Basilica.

[2] Cf. h. t. 33.

[3] This refers to *operae fabriles* not to *op. officiales*. Cf. h.t. 26. 12.

[4] Although the *exceptio iusiurandi* cannot destroy an obligation, it prevents inquiry into the question of its existence and so has the practical effect of destroying it.

45. IAVOLENUS libro secundo ex Plautio. Si is, qui hereditatem vendidit et emptori tradidit, id, quod sibi mortuus debuerat, non retinuit, repetere poterit, quia plus debito solutum per condictionem recte recipietur.

46. IDEM libro quarto ex Plautio. Qui heredis nomine legata non debita ex nummis ipsius heredis solvit, ipse quidem repetere non potest: sed si ignorante herede nummos eius tradidit, dominus, ait, eos recte vindicabit. eadem causa rerum corporalium est.

47. CELSUS libro sexto digestorum. Indebitam pecuniam per errorem promisisti: eam qui pro te fideiusserat solvit. ego existimo, si nomine tuo solverit fideiussor, te fideiussori, stipulatorem tibi obligatum fore: nec exspectandum est, ut

lie against a person who has received what belongs to him, even though it has been paid by some one other than the true debtor.[1]

45. Javolenus (Extracts from Plautius, 2). If a person, who has sold an inheritance and delivered it to the purchaser, has not retained what the deceased owed to him, he can bring an action to recover what was due to him, because what has been paid in excess of what was due may rightly be recovered by *condictio*.[2]

46. The same (Extracts from Plautius, 4). A person who has paid, on behalf of the heir and with the heir's own money, legacies which are not due, cannot indeed bring an action for recovery himself: but if he handed over, without the heir's knowledge, coins belonging to the latter, the owner (i.e. the heir) may rightly claim them by *vindicatio*.[3] The same rule applies in the case of corporeal things generally.

47. Celsus (Digesta, 6). You have promised by mistake money which was not due, and a person who had become surety for you has paid it. My opinion is that if the surety has paid in your name, you will be liable to the surety[4] and the stipulator will be liable to you;[5] and it is not necessary to wait

[1] I.e. if it has been paid in the name of the debtor or on his account. See B. p. 565; Girard, p. 657, n. (*c*).

[2] Strictly speaking the debt due to him from the testator would be extinguished on the heir entering on the inheritance, but he can recover from the purchaser on the ground of unjust enrichment. See Koschembahr-Lyskowski, II, p. 146.

[3] I.e. if the money can be identified. If it cannot be traced, the heir may resort to a *condictio* as it has been paid on his account.

[4] By an *actio mandati*.

[5] By a *condictio indebiti*, the money being paid in your name and on your behalf.

ratum habeas, quoniam potes videri id ipsum mandasse, ut tuo nomine solveretur: sin autem fideiussor suo nomine solverit quod non debebat, ipsum a stipulatore repetere posse, quoniam indebitam iure gentium pecuniam solvit: quo minus autem consequi poterit ab eo cui solvit, a te mandati iudicio consecuturum, *si modo per ignorantiam petentem exceptione non* summoverit.

48. IDEM libro sexto digestorum. Qui promisit, si aliquid a se factum sit vel cum aliquid factum sit, dare se decem, si, priusquam id factum fuerit, quod promisit dederit, non videbitur fecisse quod promisit atque ideo repetere potest.

49. MODESTINUS libro tertio regularum. His solis pecunia condicitur, quibus quoquo modo soluta est, non quibus proficit.

50. POMPONIUS libro quinto ad Quintum Mucium. Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repetere non potest.

until you ratify the payment, since you may be considered to have given a mandate for this very purpose, viz. that payment should be made in your name. But if the surety has paid in his own name what he did not owe, he can himself bring an action to recover from the stipulator, since he has paid money which was not equitably due (*iure gentium*): but in so far as the amount which he is able to recover from the person to whom he made payment falls short of what he has paid, to that extent he can recover from you in an action on mandate, provided only it was through ignorance that he did not plead an *exceptio* in bar of the plaintiff's action.[1]

48. The same (Digesta, 6). If a man has promised that if something shall be done by him, or when something has been done, he will give ten (*aurei*), then, if before the thing has been done, he has given what he promised, he will not be considered to have done what he promised to do, and therefore can claim the return of what he has paid.[2]

49. Modestinus (Regulae, 3). A *condictio* to recover money lies only against those persons to whom the money has been paid in some form or other, not against those whom the payment benefits.

50. Pomponius (on Quintus Mucius, 5). What a man has

[1] This will result from the implied mandate arising from the suretyship.

[2] No obligation arises until the condition of the promise is satisfied. Cf. h.t. 16, 17, 18, and note 2, p. 63.

51. IDEM libro sexto ad Quintum Mucium. Ex quibus causis retentionem quidem habemus, petitionem autem non habemus, ea si solverimus, repetere non possumus.

52. IDEM libro vicensimo septimo ad Quintum Mucium. Damus aut ob causam aut ob rem: ob causam praeteritam, veluti eum ideo do, quod aliquid a te consecutus sum vel quia aliquid a te factum est, ut, etiamsi falsa causa sit, repetitio eius pecuniae non sit: ob rem vero datur, ut aliquid sequatur, quo non sequente repetitio competit.

53. PROCULUS libro septimo epistularum. Dominus testamento servo suo libertatem dedit, si decem det: servo ignorante id testamentum non valere data sunt mihi decem: quaeritur, quis repetere potest. Proculus respondit: si ipse servus peculiares nummos dedit, cum ei a domino id permissum non

given, knowing that it is not due, with the intention of reclaiming it subsequently, he is not able to recover.[1]

51. The same (on Quintus Mucius, 6). In those cases, in which although we have a right of retention we have not a right to bring an action, if we make payment we cannot recover what we have paid.[2]

52. The same (on Quintus Mucius, 27). We give either for a reason (*ob causam*) or for a purpose (*ob rem*);[3] for a reason relating to what is past, for instance, when I give because I have obtained something from you or because something has been done by you, so that, even if the reason is without foundation, there is no action for the recovery of the money: on the other hand, there is a gift for a purpose when it is made that something may come to pass as a consequence, and if that does not come to pass an action for recovery is available.

53. Proculus (Epistolae, 7). A master in his testament has made a gift of freedom to his slave on condition of his paying ten (*aurei*) (to me); the slave being in ignorance of the fact that the will was not valid, the ten (*aurei*) have been paid to me: the question is raised as to who can bring an action for the return of the money. Proculus replied as follows: if the slave himself gave money out of his *peculium*, although his master[4] had not given him permission to do so, the coins remain the property of the master, and he ought to sue for them, not in the form of a

[1] Cf. h.t. 1. 1.
[2] See h.t. 33.
[3] Cf. D. 12. 5. 1 pr.
[4] I.e. the heir on intestacy of the testator.

esset, manent nummi domini eosque non per condictionem, sed in rem actione petere debet. si autem alius rogatu servi suos nummos dedit, facti sunt mei eosque dominus servi, cuius nomine dati sunt, per condictionem petere potest: sed tam benignius quam utilius est recta via ipsum qui nummos dedit suum recipere.

54. PAPINIANUS libro secundo quaestionum. Ex his omnibus causis, quae iure non valuerunt vel non habuerunt effectum, secuta per errorem solutione condictioni locus erit.

55. IDEM libro sexto quaestionum. Si urbana praedia locaverit praedo, quod mercedis nomine ceperit, ab eo qui solvit non repetetur, sed domino erit obligatus. idemque iuris erit in vecturis navium, quas ipse locaverit aut exercuerit, item mercedibus servorum, quorum operae per ipsum fuerint locatae. nam si servus non locatus mercedem ut domino

condictio, but by an action *in rem* (i.e. by *vindicatio*).[1] But if someone else gave his own money at the slave's request, the coins became my property, and the master of the slave, on whose account they were paid, may sue for their return by *condictio*; but it is both more equitable and more convenient that the person who paid the money should recover his own property by direct action.[2]

54. Papinianus (Quaestiones, 2). In all those cases in which transactions have become invalid or have failed to take effect by operation of law and in consequence payment has been made by mistake, a *condictio* will be available.

55. The same (Quaestiones, 6). If a wrongful possessor has let out buildings, what he has received by way of rent cannot be recovered by the person who has paid it, but he (i.e. the wrongful possessor) will be answerable for it to the owner of the buildings. The same principle will apply in the case of money paid for freight of ships which he (i.e. the wrongful possessor) has let out or worked, and also the money paid for the hire of slaves, whose services have been let out by him. For if a slave, who has not been let out,[3] has handed over his wages to a wrongful possessor, as if he were his owner, the money

[1] Unless the money has been expended by me, in which case there is a *condictio*.

[2] By a *utilis condictio indebiti* against me, instead of an action brought against the owner of the slave.

[3] I.e. not let out by the wrongful possessor, e.g. a slave who has hired *himself* out.

praedoni rettulit, non fiet accipientis pecunia. quod si vecturas navium, quas dominus locaverat, item pensiones insularum acceperit, ob indebitum ei tenebitur, qui non est liberatus solvendo. quod ergo dici solet praedoni fructus posse condici, tunc locum habet, cum domini fructus fuerunt.

56. IDEM libro octavo quaestionum. Sufficit ad causam indebiti incertum esse, temporaria sit an perpetua exceptionis defensio. nam si qui, ne conveniatur, donec Titius consul fiat, paciscatur, quia potest Titio decedente perpetua fieri exceptio,

will not become the property of the receiver. Moreover, if he has received money paid for freight of ships which the owner has let on hire, or the rents of buildings, he will be liable, in an action for money paid which was not owing, to the party who has not been discharged from liability by payment. Hence the customary assertion that fruits may be claimed by *condictio* from a wrongful possessor applies only to cases in which the fruits belonged to the owner of the property.[1]

56. The same (Quaestiones, 8). It is sufficient in order to furnish a ground for claiming that money was not due, that it is doubtful whether the effect of an *exceptio* as a defence is temporary or perpetual. For if a man makes an agreement that he is not to be sued until Titius becomes consul, seeing that the *exceptio* may become perpetual by the death of Titius, which is temporary when Titius enters on the consulship, it may be said quite reasonably that an action may be brought to recover what is paid in the meantime: for just as a pact,[2] which is made to

[1] A *condictio* could be brought by the *dominus* against the *praedo* only for fruits which he could have claimed by *vindicatio* if they had not been consumed. In the case in the text, the freights and rents have never become the property of the *dominus* and he cannot bring a *condictio* for them against the *praedo*. But the persons making the payments, as they have paid the wrong person and continue liable to the actual contracting party, viz. the *dominus*, can recover from the *praedo* what they have paid as being *indebitum*.

[2] I.e. a *pactum de non petendo*. If there is a pact not to sue before a day certain to arrive, the debtor who pays before that date cannot recover, because he has paid what is certain to become due later (h.t. 10). If there is a pact not to sue before a time which may never arrive, recovery is allowed (h.t. 16 pr.). Hence Papinian's argument is that a condition and a date may have similar effects in law: a condition certain to come to pass is really no condition at all, and resembles a fixed date in not giving rise to a *condictio* on account of premature payment; a condition proper, i.e. one that is uncertain of fulfilment, gives rise to a *condictio* and so also does a future date for payment which is dependent on an uncertainty, if payment is made too soon.

quae ad tempus est Titio consulatum ineunte, summa ratione dicetur, quod interim solvitur, repeti: ut enim pactum, quod in tempus certum collatum est, non magis inducit condictionem, quam si ex die debitor solvit, ita prorsum defensio iuris, quae causam incertam habet, condictionis instar optinet.

57. IDEM libro tertio responsorum. Cum indebitum impuberis nomine tutor numeravit, impuberis condictio est. (1) Creditor, ut procuratori suo debitum redderetur, mandavit: maiore pecunia soluta procurator indebiti causa convenietur: quod si nominatim, ut maior pecunia solveretur, delegavit, indebiti cum eo qui delegavit erit actio, quae non videtur perempta, si frustra cum procuratore lis fuerit instituta.

58. IDEM libro nono responsorum. Servo manumisso fidei-

depend on a particular day, no more gives rise to a right to bring a *condictio* (if payment is made earlier) than if the debtor has paid after the appointed day, so also it is clear that a legal defence which is founded on a pact of uncertain operation[1] is equivalent in effect to a condition.

57. The same (Responsa, 3). When a tutor has paid on behalf of a ward under age what is not owing, the right to bring a *condictio* is vested in the ward.[2] (1) A creditor has given directions that a debt should be paid to his *procurator*: if a larger sum of money than is due has been paid, the *procurator* may be sued (for return of the excess) on the ground of payment of what was not due: but if the creditor has given authority to pay the larger sum of money to a *procurator* expressly indicated by name, the action for return of money paid when not owing will lie against the person who gave the authority, and the right of action does not appear to be barred by bringing a suit unsuccessfully against the *procurator*.[3]

58. The same (Responsa, 9). A testator bequeathed a *fideicommissum* in such terms to a slave whom he manumitted as to make it conditional on the slave obtaining his freedom by virtue of the testament: after the slave had received the money without resort to litigation,[4] he was declared to be freeborn:

[1] *causam incertam*, i.e. where it is such as to be uncertain whether it will operate as a perpetual bar to an action or not.

[2] The *condictio* is brought by the person on whose behalf the payment is made and not by the person actually paying the money. See C. 4. 5. 6.

[3] The payment, in so far as the agent had authority, is a payment to the principal: C. 4. 5. 2; D. 46. 3. 34 pr.

[4] If he had received the money in satisfaction of a judgment, it could not have been treated as *indebitum*: D. 17. 1. 29. 5; C. 4. 5. 1.

commissum ita reliquit, si ad libertatem ex testamento pervenerit: post acceptam sine iudice pecuniam ingenuus pronuntiatus est: indebiti fideicommissi repetitio erit.

59. IDEM libro secundo definitionum. Si fideiussor iure liberatus solverit errore pecuniam, repetenti non oberit: si vero reus promittendi per errorem ei ipse postea pecuniam solverit, non repetet, cum prior solutio, quae fuit irrita, naturale vinculum non dissolvit, nec civile, si reus promittendi tenebatur.

60. PAULUS libro tertio quaestionum. Iulianus verum debitorem post litem contestatam manente adhuc iudicio negabat solventem repetere posse, quia nec absolutus nec condemnatus repetere posset: licet enim absolutus sit, natura tamen debitor permanet: similemque esse ei dicit, qui ita promisit, sive navis ex Asia venerit sive non venerit, quia ex una causa alterius solutionis origo proficiscitur. (1) Ubi autem quis quod pure

there will be a right of action to recover the *fideicommissum* as not having been due.

59. The same (Definitiones, 2). If a surety (*fideiussor*), who has been released by operation of law, has paid money by mistake, there will be no obstacle to his bringing an action to recover it; but if the principal debtor also himself has paid afterwards by mistake, he has no claim to recover, seeing that the earlier payment, which was void, did not dissolve the natural obligation, nor the civil obligation either, if the principal debtor was bound.[1]

60. Paulus (Quaestiones, 3). Julian was of opinion that a debtor who really owed the money,[2] and who paid it after *litis contestatio* whilst the suit was still pending, could not have an action to recover it; because whether absolved or condemned he cannot sue to recover: for even if he be absolved, he nevertheless remains indebted by natural law: and he (Julian) says that his position is similar to that of a man who has made a promise on this condition, "whether a ship shall have come from Asia or shall not have come", because from one alternative or the other a ground of payment arises.[3] (1) But where a man who owes

[1] The payment made by the surety, who has been discharged by operation of law, does not affect the obligation of the principal debtor, whether the principal is bound by a civil or natural obligation.

[2] *verum debitorem*, i.e. a debtor bound either by a civil or a natural obligation.

[3] *ex una causa*. The apparent alternative is unreal and the obligation is unconditional. The case is expressed somewhat awkwardly but the sense is clear. The meaning

debet sub condicione novandi animo promisit, plerique putant pendente novatione solutum repetere posse, quia ex qua obligatione solvat, adhuc incertum sit: idemque esse etiam, si diversas personas ponas eandem pecuniam pure et sub condicione novandi animo promisisse. sed hoc dissimile est: in stipulatione enim pura et condicionali eundem debiturum certum est.

61. SCAEVOLA libro quinto responsorum. Tutores pupilli quibusdam creditoribus patris ex patrimonio paterno solverunt, sed postea non sufficientibus bonis pupillum abstinuerunt: quaeritur, an quod amplius creditoribus per tutores pupilli solutum est vel totum quod acceperunt restituere debeant.

money absolutely has promised to pay it on a condition, his intention being to novate the contract, most authorities consider that he can sue to recover money paid while the novation is in suspense, because it is not yet certain under which obligation he is making payment:[1] and the same rule also applies (in their opinion) if you suppose different persons to have promised the same sum of money, one absolutely, and the other conditionally with the intention of novating the contract. But this latter is a different case: for in the case of a stipulation which is made absolutely and also made conditionally it is clear that the same person will be debtor in either case.[2]

61. Scaevola (Responsa, 5). The tutors of a *pupillus* paid certain creditors of his father out of the father's estate, but afterwards, the assets not proving sufficient to meet the liabilities, made the *pupillus* abstain from adiating the inheritance: the question is raised whether the creditors are bound to restore the amount paid to them by the tutors of the *pupillus* in excess (of what they would be entitled to) or the whole of what they received. My answer was that if there had been no fraudulent conduct, they were under no obligation either to the tutor or to

clearly is that if he pays and is subsequently condemned he has paid what is due both civilly and naturally; but even if absolved, he has paid what is due naturally.

[1] See G. III. 179.

[2] When there are two promisors, one promising absolutely and the other conditionally, the latter is not bound at all, not even naturally, until the condition comes to pass, but when one man, already absolutely bound, promises conditionally, he is already bound even prior to the condition being fulfilled. Hence the cases are not similar, for in the first there is no doubt as to the debtor being bound, although we cannot say under which obligation; in the second, one debtor is bound until the condition is fulfilled, and even then is not free; the other is free until the condition is fulfilled, and is then bound.

respondi, si nihil dolo factum esset, tutori quidem vel pupillo non deberi, creditoribus autem aliis in id, quod amplius sui debiti solutum est, teneri.

62. MAECIANUS libro quarto fideicommissorum. Fideicommissum in stipulatione deductum tametsi non debitum fuisset, quia tamen a sciente fidei explendae causa promissum esset, debetur.

63. GAIUS libro singulari de casibus. Neratius casum refert, ut quis id quod solverit repetere non possit, quasi debitum dederit, nec tamen liberetur: velut si is, qui cum certum hominem deberet, statuliberum dederit: nam ideo eum non liberari, quod non in plenum stipulatoris hominem fecerit, nec tamen repetere cum posse, quod debitum dederit.

64. TRYPHONINUS libro septimo disputationum. Si quod

the *pupillus*,[1] but that they were liable to the other creditors to the extent of their own debts which had been paid in excess.

62. Maecianus (of Fideicommissa, 4). If payment of a *fideicommissum* has been made the subject of a stipulation, although it was not due, nevertheless, seeing that it has been promised with the object of carrying out the trust by one who was aware of the facts, it gives rise to a legal debt.[2]

63. Gaius (de Casibus). Neratius mentions a case where it may come to pass that a man is not able to sue to recover what he has paid, inasmuch as he handed over what was due from him and yet is not discharged from his obligation: for example, suppose that one who is bound to transfer a particular slave, has delivered him when he is a *statuliber*; for he is not thereby discharged from his obligation, seeing that he has not made the slave the absolute property of the stipulator, and yet he cannot sue to recover him because he handed over what was due.[3]

64. Tryphoninus (Disputationes, 7). If a master has paid

[1] As the inheritance has been renounced, neither the pupil nor his tutors have any further interest in it. The question of refunding by creditors who have received more than their proportionate payment is one to be settled between the creditors of the inheritance.

[2] Here there is an independent obligation arising under the stipulation, and, moreover, made with knowledge of the facts.

[3] The slave must be understood to become a *statuliber* through the act of the debtor or an act for which he is responsible. Pothier suggests a case in point, viz. that the owner of a slave is under an obligation to give him to another person, and instead of doing so makes a will in which he gives the slave freedom on some condition; the heir then gives the slave as a *statuliber* to the promisee. Cf. D. 46. 3. 92. 1.

dominus servo debuit, manumisso solvit, quamvis existimans ei aliqua teneri actione, tamen repetere non poterit, quia naturale adgnovit debitum: ut enim libertas naturali iure continetur et dominatio ex gentium iure introducta est, ita debiti vel non debiti ratio in condictione naturaliter intellegenda est.

65. PAULUS libro septimo decimo ad Plautium. In summa, ut generaliter de repetitione tractemus, sciendum est dari aut ob transactionem aut ob causam aut propter condicionem aut ob rem aut indebitum: in quibus omnibus quaeritur de repetitione. (1) Et quidem quod transactionis nomine datur, licet res nulla media fuerit, non repetitur: nam si lis fuit, hoc ipsum, quod a lite discceditur, causa videtur esse. sin autem evidens calumnia detegitur et transactio imperfecta est, repetitio dabitur. (2) Id quoque, quod ob causam datur, puta quod negotia

to a slave after manumission a debt which he owed to him before, even though under the impression that he would be liable in some form of action, he nevertheless cannot reclaim what he has paid because he has acknowledged an obligation good by natural law: for just as liberty is a matter of natural law and ownership of slaves was introduced by the *ius gentium*,[1] so the question of what is owing or not owing in the case of a *condictio* must be interpreted by reference to natural law.

65. Paulus (on Plautius, 17). To put the matter briefly, in order to give a general view of actions for the recovery of property, it must be understood that a thing is given either on account of a compromise or by reason of some inducement (*ob causam*)[2] or in consequence of the fulfilment of a condition, or for a purpose (*ob rem*)[3] or without being due: in all these cases the question of a right to recover arises. (1) And clearly what is given on account of a compromise, even if there was no substantial question in dispute, cannot be recovered: for if there has been a suit, the very fact that the suit is abandoned is considered to be a valid ground for the gift. But if a clear case of fraudulent claim is proved and the compromise is invalid, an action for recovery will be granted.[4] (2) Again, what is given

[1] Cf. Inst. 1. 5 pr.

[2] *Ob causam praeteritam*: h.t. 52.

[3] *Ob rem, ut aliquid sequatur* (i.e. in the future): h.t. 52.

[4] Even if the compromise was not based on a real debt or obligation, but only on an alleged one. There is at any rate the *proxima causa* that the proceedings against the defendant are brought to an end. But

mea adiuta ab eo putavi, licet non sit factum, quia donari volui, quamvis falso mihi persuaserim, repeti non possc. (3) Sed agere per condictionem propter condicionem legati vel hereditatis, sive non sit mihi legatum sive ademptum legatum, possum, ut repetam quod dedi, quoniam non contrahendi animo dederim, quia causa, propter quam dedi, non est secuta. idem et si hereditatem adire nolui vel non potui. non idem potest dici, si servus meus sub condicione heres institutus sit et ego dedero, deinde manumissus adierit: nam hoc casu secuta res est. (4) Quod ob rem datur, ex bono et aequo habet repetitionem: veluti si dem tibi, ut aliquid facias, nec feceris. (5) Ei, qui

because of some inducement, for example, because I thought assistance had been given in my business transactions by the donee, even though this had not been done, cannot be reclaimed, seeing that I desired to make the gift, although I acted under a false impression.[1] (3) But I can proceed by *condictio* on account of a condition attached to a legacy or an inheritance, in order to recover what I have given, in case the legacy turns out either not to have been bequeathed to me or to have been adeemed,[2] since I have not given with the intention of making a contract, because the purpose for which I made the payment has not been fulfilled.[3] The same principle applies if I have refused or have been unable to adiate the inheritance. The same cannot be said if my slave has been appointed heir subject to a condition and I have given something (in fulfilment of the condition) and then he adiates after being manumitted; for in this case the purpose (of the gift) has been accomplished. (4) What is given for a purpose may be the subject of an action for recovery in accordance with what is just and equitable: for example, if I give you something in consideration of your doing some act, and you do not do it. (5) Both fruits and offspring must be

there must not be oppression or fraud: C. 1. 18. 6. Cf. the English cases on consideration for a compromise—*Callisher* v. *Bischoffsheim*, L.R. 5 Q.B. 449; *Wade* v. *Simeon*, 2 C.B. 548. See Anson on Contract (ed. 17), pp. 99–100.

[1] *Falsa causa non nocet*: J. Inst. 2. 20. 31.

[2] *agere possum*, i.e. I can sue to recover what I gave in order that I might receive a legacy or inheritance left to me on condition of so giving, if it turns out that the legacy or inheritance has not really been bequeathed or has been subsequently adeemed.

[3] I gave in order to comply with a condition which has not been fulfilled. I did not *buy* the inheritance or legacy subject to the risk of ademption; but I paid to have the inheritance or legacy, and the object of the payment has failed.

indebitum repetit, et fructus et partus restitui debet deducta impensa. (6) In frumento indebito soluto et bonitas est et, si consumpsit frumentum, pretium repetet. (7) Sic habitatione data pecuniam condicam, non quidem quanti locari potuit, sed quanti tu conducturus fuisses. (8) Si servum indebitum tibi dedi eumque manumisisti, si sciens hoc fecisti, teneberis ad pretium eius, si nesciens, non teneberis, sed propter operas eius liberti et ut hereditatem eius restituas. (9) Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id quod alius debebat alius quasi ipse debeat solvat.

66. PAPINIANUS libro octavo quaestionum. Haec condictio

restored to a person who brings an action for the return of what was not owing, a deduction being allowed in respect of expenditure. (6) In the case of corn having been delivered when it was not due, the quality also must be taken into account, and if the defendant has consumed the corn, the value may be recovered. (7) So also when a right of habitation (*habitatio*) has been given by way of payment (when not due) I can bring a *condictio* for the money value; but not for the amount at which it could have been let, but for the amount at which you (the defendant) would have hired it.[1] (8) If I have delivered to you a slave who was not due and you have manumitted him, then if you have done this with knowledge of the fact,[2] you will be liable to pay his value, but if you were not aware of the fact, you will not be thus liable, but you must make restitution in respect of the services of the freedman and also his inheritance.[3] (9) Payment of what is not due takes place not only when there is no debt at all but also if what is owing to one man is paid to another, or if what one man was owing, another pays under the impression that he is owing it himself.

66. Papinianus (Quaestiones, 8). This form of *condictio*, introduced on the ground of justice and equity, has become the customary remedy for the recovery of property belonging to one

[1] The *condictio indebiti* is on the ground of unjust enrichment and consequently is limited, in the absence of fraud, to the benefit derived by the defendant.

[2] *Si sciens hoc fecisti*, i.e. if you received him under the belief that he was due to you but learned that he was not due before you manumitted him. If you took him with knowledge that he was not due, you are guilty of *furtum* and liable to the *actio furti* as well as the *c. furtiva*.

[3] For succession to freedmen, see G. III. 40–42.

ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consuevit.

67. SCAEVOLA libro quinto digestorum. Stichus testamento eius, quem dominum suum arbitrabatur, libertate accepta, si decem annis ex die mortis annuos decem heredibus praestitisset, per octo annos praefinitam quantitatem ut iussus erat dedit, postmodum se ingenuum comperit nec reliquorum annorum dedit et pronuntiatus est ingenuus: quaesitum est, an pecuniam, quam heredibus dedit, ut indebitam datam repetere et qua actione possit. respondit, si eam pecuniam dedit, quae neque ex operis suis neque ex re eius, cui bona fide serviebat, quaesita sit, posse repeti. (1) Tutor creditori pupilli sui plus quam debebatur exsolvit et tutelae iudicio pupillo non imputavit: quaero an repetitionem adversus creditorem haberet. respondit habere. (2) Titius cum multos creditores haberet, in quibus et

person which is found in the possession of another without any ground of acquisition.

67. Scaevola (Digesta, 5). Stichus, after receiving a gift of his freedom under the testament of a person whom he believed to be his master, on condition that for ten years from the death of the testator he should pay ten (*aurei*) every year to the heirs, paid the sum so specified, as he was directed, for eight years: afterwards he discovered that he was freeborn and did not pay for the remaining years, and was judicially declared to be freeborn: the question arose as to whether he could reclaim the money which he had given to the heirs as not having been due, and, if so, by what form of action. The answer was that if he paid money which had been acquired neither by his own services nor through the property of the person whom he was serving in good faith,[1] an action could be brought for its return. (1) A tutor paid to the creditor of his *pupillus* more than was owing, and in an action for taking the accounts of the tutorship did not charge the payment against the *pupillus*: I ask whether he would have an action for the return of the excess payment against the creditor. The answer was that he would.[2] (2) Titius, at a time when he was indebted to many creditors,

[1] *neque ex operis suis neque ex re eius*, for in the case of property acquired by his own services or by means of the property of his apparent owner, the latter would be entitled. See G. II. 92.

[2] There would be a *utilis condictio indebiti*. The passage suggests that the tutor paid the debt *suo nomine*. If he had paid in the name of the *pupillus*, the latter would have the *condictio*: h.t. 57 pr.

Seium, bona sua privatim facta venditione Maevio concessit, ut satis creditoribus faceret: sed Maevius solvit pecuniam Seio tamquam debitam, quae iam a Titio fuerat soluta: quaesitum est, cum postea repperiantur apochae apud Titium debitorem partim solutae pecuniae, cui magis repetitio pecuniae indebitae solutae competit, Titio debitori an Maevio, qui in rem suam procurator factus est. respondit secundum ea quae proponerentur ei, qui postea solvisset. (3) Idem quaesiit, an pactum, quod in pariationibus adscribi solet in hunc modum "ex hoc contractu nullam inter se controversiam amplius esse" impediat repetitionem. respondit nihil proponi, cur impediret. (4) Lucius Titius Gaio Seio minori annis viginti quinque pecuniam certam credidit et ab eo aliquantum usurarum nomine accepit, et Gaii Seii minoris heres adversus Publium Maevium a praeside provinciae in integrum restitutus est, ne debitum hereditarium solveret, et nec quicquam de usuris eiusdem sortis, quas Seius

one of whom was Seius, assigned his property to Maevius by a secret sale, in order that the latter should settle with the creditors: but Maevius paid a sum of money to Seius, as if it were due, which had already been paid by Titius: the question was raised, when receipts were afterwards found in the possession of Titius showing that the money had been partly paid, as to who was entitled to bring the action for the return of the money paid when it was not owing, Titius, the debtor, or Maevius, who had been procurator for his own benefit (*procurator in rem suam*). The answer was that, according to the facts stated, it was the one who made the later payment. (3) The same client asked whether the pact which it is customary to include in settling accounts, in these terms—"that in pursuance of this agreement there shall be no further dispute between the parties"—would be a bar to the action. The answer was that there was nothing in the facts as stated to interfere with the action.[1] (4) Lucius Titius lent a certain sum of money to Gaius Seius, who was under twenty-five years of age, and received from him payment of a certain sum on account of interest; and the heir of Gaius Seius, the minor, obtained a decree of *restitutio in integrum* against Publius Maevius (heir of Lucius Titius?) from the governor of the province, in order to avoid paying the

[1] *pariatio = debitorum ac nominum exaequatio* (Dirksen). The *pariatio* is merely a calculation of a balance arising from cross claims. It does not affect the question of the debt being legally due or not.

minor annis viginti quinque exsolveret, repetendis tractatum apud praesidem aut ab eo est pronuntiatum: quaero, an usuras, quas Gaius Seius minor annis viginti quinque quoad viveret creditori exsolveret, heres eius repetere possit. respondit secundum ea quae proponerentur condici id, quod usurarum nomine defunctus solvisset, non posse. item quaero, si existimes repeti non posse, an ex alio debito heres retinere eas possit. respondit ne hoc quidem.

debt due from the inheritance; but nothing was said before the governor and no decree was made by him as to reclaiming the interest on the said principal sum which Seius had paid whilst under twenty-five years of age: I wish to know whether his heir can claim the return of the interest which Gaius Seius, when under twenty-five years of age, paid to the creditor during his lifetime. The answer was that, on the facts as they were stated, a *condictio* would not lie to recover what the deceased had paid by way of interest.[1] I wish further to ask whether, if you are of opinion that no action can be brought for repayment, the heir can retain the interest out of some other debt. The answer was that not even this could be allowed.

[1] Because it had not been claimed in the application for *restitutio in integrum* and was due under a natural obligation.

V. DE CONDICTIONE SINE CAUSA

D. 12. 7

1. ULPIANUS libro quadragensimo tertio ad Sabinum. Est et haec species condictionis, si quis sine causa promiserit vel si solverit quis indebitum. qui autem promisit sine causa, condicere quantitatem non potest quam non dedit, sed ipsam obligationem. (1) Sed et si ob causam promisit, causa tamen secuta non est, dicendum est condictionem locum habere. (2) Sive ab initio sine causa promissum est, sive fuit causa promittendi quae finita est vel secuta non est, dicendum est condictioni locum fore. (3) Constat id demum posse condici alicui, quod vel non ex iusta causa ad eum pervenit vel redit ad non iustam causam.

Concerning the *condictio sine causa* (for want of ground of obligation).[1]

1. Ulpianus (on Sabinus, 43). This kind of *condictio* is available if anyone has promised without any ground of obligation or if anyone has paid what is not owing.[2] But a man who has made a promise without ground of obligation cannot bring a *condictio* for a sum of money which he has not given, but only to cancel the obligation itself. (1) Moreover if he has promised on some ground of obligation and such ground has failed, it must be said that the *condictio* will be available.[3] (2) Whether the promise was made originally without ground of obligation or there was a ground for the promise which has ceased to exist or has not come to pass, it must be said that the *condictio* is available. (3) It is settled that that alone may be claimed by *condictio* from anyone which has either come to his hands without any legal ground of obligation or on a ground which turns out to be not a legal ground of obligation.[4]

[1] The description "sine causa" as applied to *condictiones* is used in a wider sense, in which, as indicated in h.t. 1, it covers the ground of the *c. indebiti*, *c. causa data causa non secuta* and *c. ob turpem vel iniustam causam*, and also in a narrower sense in connection with a few special cases dealt with in this title (2, 3, 5) and elsewhere, which involve unjustifiable enrichment, and do not readily fall under one of the other categories, e.g. D. 19. 1. 11. 6 (retention of *arrha* after sale completed), D. 24. 1. 6 (gifts between spouses), C. 4. 9 (*cautio* retained after debt paid).

[2] *C. sine causa* concurrent with *c. indebiti*. Cf. D. 12. 6. 66.

[3] *C. sine causa* concurrent with *c. causa data causa non secuta*.

[4] *C. sine causa* concurrent with *c. ob iniustam causam*.

2. IDEM libro trigensimo secundo ad edictum. Si fullo vestimenta lavanda conduxerit, deinde amissis eis domino pretium ex locato conventus praestiterit posteaque dominus invenerit vestimenta, qua actione debeat consequi pretium quod dedit? et ait Cassius eum non solum ex conducto agere, verum condicere domino posse: ego puto ex conducto omnimodo cum habere actionem: an autem et condicere possit, quaesitum est, quia non indebitum dedit: nisi forte quasi sine causa datum sic putamus condici posse: etenim vestimentis inventis quasi sine causa datum videtur.

3. IULIANUS libro octavo digestorum. Qui sine causa obligantur, incerti condictione consequi possunt ut liberentur: nec refert, omnem quis obligationem sine causa suscipiat an maiorem quam suscipere eum oportuerit, nisi quod alias condictione id agitur, ut omni obligatione liberetur, alias ut exoneretur: veluti

2. The same (on the Edict, 32). If a fuller has contracted to clean clothes and then, the clothes having been lost, on being sued *ex locato*, has made good the price thereof to the owner, and subsequently the owner has found the clothes, by what action ought he to recover the price which he has paid? and Cassius says that he can not only bring an action *ex conducto*,[1] but also bring a *condictio* against the owner: in my opinion he certainly has an action *ex conducto*; but whether he can also resort to a *condictio* has been disputed, seeing that he did not give what was not owing: unless perhaps we consider that a *condictio* can be brought in respect of the payment being made as it were without ground of obligation (*sine causa*); for the clothes having been found, the payment appears to have been made without ground of obligation to support it.

3. Iulianus (Digesta, 8). Those who are under an obligation without legal ground to support it (*sine causa*) may obtain release by a *condictio incerti*; nor does it matter whether a man undertakes the whole obligation without legal ground or one in excess of what he is bound to undertake, except that in the one case the claim is to obtain a release from the whole obligation, in the other that he may be relieved (of liability for the excess): take, for instance, a man who has promised ten (*aurei*); for if

[1] In the *actio ex conducto*, being *bonae fidei*, there may be a claim on the implied undertaking "*dolum malum abesse, abfuturum esse*". The *locator* therefore who attempts to keep both the money he received and the clothes he has recovered is guilty of *dolus*. Cf. h.t. 1. 3, *redit ad non iustam causam*.

qui decem promisit; nam si quidem nullam causam promittendi habuit, incerti condictione consequitur, ut tota stipulatio accepto fiat, at si, cum quinque promittere deberet, decem promisit, incerti consequetur, ut quinque liberetur.

4. AFRICANUS libro octavo quaestionum. Nihil refert, utrumne ab initio sine causa quid datum sit an causa, propter quam datum sit, secuta non sit.

5. PAPINIANUS libro undecimo quaestionum. Avunculo nuptura pecuniam in dotem dedit neque nupsit: an eandem repetere possit, quaesitum est. dixi, cum ob turpem causam dantis et accipientis pecunia numeretur, cessare condictionem et in delicto pari potiorem esse possessorem: quam rationem fortassis aliquem secutum respondere non habituram mulierem condictionem: sed recte defendi non turpem causam in proposito quam nullam fuisse, cum pecunia quae daretur in dotem converti nequiret: non enim stupri, sed matrimonii gratia datam esse.

indeed he had no legal ground for making the promise, he obtains by the *condictio incerti* a formal release from the entire stipulation; but if, when he ought to promise five, he has promised ten, he obtains by the *condictio incerti* a release in respect of five.

4. Africanus (Quaestiones, 8). It makes no difference whether a thing was given in the first instance without any legal ground, or that the ground on account of which it was given has failed to materialise.

5. Papinianus (Quaestiones, 11). A woman, intending to be married to her maternal uncle, gave a sum of money as *dos*, but the marriage did not take place. The question was raised whether she could bring an action to recover the same. I said that since the money is paid over on a ground which is immoral both on the part of the giver and of the receiver, the *condictio* is not allowed, and where the parties are equally guilty of wrongdoing the person in possession is in the stronger position:[1] and that perhaps anyone following this reasoning would give the opinion that the woman would not be entitled to bring a *condictio*; but that it might rightly be maintained that in the case under consideration the ground was not so much immoral as void, seeing that it was impossible for the money which was given to be converted into a *dos*: for it was not given in view of illicit inter-

[1] Cf. D. 12. 5. 2. 2; 12. 5. 8; 50. 17. 128.

(1) Noverca privigno, nurus socero pecuniam dotis nomine dedit neque nupsit. cessare condictio prima facie videtur, quoniam iure gentium incestum committitur: atquin vel magis in ea specie nulla causa dotis dandae fuit, condictio igitur competit.

course but in view of marriage.[1] (1) A stepmother gave money as a *dos* to her stepson or a daughter-in-law to her father-in-law; and no marriage took place. At first sight it appears that no right to a *condictio* arises, since a case of incest by the *ius gentium* is involved: nevertheless, in a case of this kind there was rather no ground at all for giving a *dos*, and therefore a *condictio* is available.[1]

[1] If the woman was aware of the illicit character of the proposed marriage it is suggested that the gift is made *ob turpem causam* and therefore cannot be recovered. But it would appear that this is immaterial; the woman gave the money to be *dos*, and *dos* can only exist in case of a valid marriage. The marriage being legally impossible, the gift is *sine causa* and can be recovered by *condictio*.

VI. DE CONDICTIONE FURTIVA

D. 13. 1

1. ULPIANUS libro octavo decimo ad Sabinum. In furtiva re soli domino condictio competit.

2. POMPONIUS libro sexto decimo ad Sabinum. Condictione ex causa furtiva et furiosi et infantes obligantur, cum heredes necessarii exstiterunt, quamvis cum eis agi non possit.

3. PAULUS libro nono ad Sabinum. Si condicatur servus ex causa furtiva, id venire in condictionem certum est quod intersit agentis, veluti si heres sit institutus et periculum subeat dominus hereditatis perdendae. quod et Iulianus scribit. item si mortuum hominem condicat, consecuturum ait pretium hereditatis.

Concerning the *condictio furtiva*.

1. Ulpianus (on Sabinus, 18). In the case of a thing stolen the *condictio* is available to the owner alone.[1]

2. Pomponius (on Sabinus, 16). Both lunatics and infants are liable to be sued in a *condictio* on the ground of theft when they have become *heredes necessarii* (necessary heirs), although an action cannot be brought against them in their personal capacity.[2]

3. Paulus (on Sabinus, 9). If a *condictio* on the ground of theft is brought for a slave, it is clear that the interest of the plaintiff is to be considered as the measure of reparation in the *condictio*; as, for example, if the slave has been appointed heir to someone and the master runs the risk of losing the inheritance. This Julian also maintains. Likewise, if the *condictio* is for a slave who is dead, he says that the plaintiff will recover the value of the inheritance.[3]

[1] Cf. D. 47. 2. 14. 16. This is not universally true. See h.t. 12. 2 where a *condictio incerti* is given to a pledgee from whom a thing is stolen.

The *c. furtiva* is anomalous (see G. IV. 4) and differs from the ordinary *condictio* which is to recover compensation when ownership has been parted with in circumstances in which the law considers that such compensation should equitably be paid. Theft does not change the ownership: hence the *c. furtiva* is in reality for recovery of the loss incurred by the owner by being deprived of possession. The rule that none but the owner can sue does not apply to a tutor or curator. See D. 47. 2. 57. 4: *Condicere autem rem furtivam tutor pupilli et curator furiosi eorum nomine possunt.*

[2] I.e. by c. *furtiva*. It is brought against them *qua* heirs. They are not liable in their personal capacity as they cannot form the fraudulent intent required for *furtum*. *agi* here cannot mean the *actio furti* as, being a penal action, it does not survive the wrongdoer.

[3] Only if the slave died after the testament was opened, the reason being the presumption that if he had been in his owner's possession, he would have been ordered to enter on the inheritance.

4. ULPIANUS libro quadragensimo primo ad Sabinum. Si servus vel filius familias furtum commiserit, condicendum est domino id quod ad eum pervenit: in residuum noxae servum dominus dedere potest.

5. PAULUS libro nono ad Sabinum. Ex furtiva causa filio familias condici potest: numquam enim ea condictione alius quam qui fecit tenetur aut heres eius.

6. ULPIANUS libro trigensimo octavo ad edictum. Proinde etsi ope consilio alicuius furtum factum sit, condictione non tenebitur, etsi furti tenetur.

7. IDEM libro quadragensimo secundo ad Sabinum. Si pro fure damnum decisum sit, condictionem non impediri verissimum est: decisione enim furti quidem actio, non autem condictio tollitur. (1) Furti actio poenam petit legitimam, condictio rem ipsam. ea res facit, ut neque furti actio per

4. Ulpianus (on Sabinus, 41). If a slave or a *filiusfamilias* has committed a theft, the *condictio* should be brought against the master for what has come into his hands; for the balance the master can make noxal surrender of the slave.[1]

5. Paulus (on Sabinus, 9). A *condictio* on the ground of theft can be brought against a *filiusfamilias*: for no one other than the person who committed the theft or his heir is ever held liable in this form of *condictio*.

6. Ulpianus (on the Edict, 38). Consequently, even though a theft has been committed with the aid and counsel of some other person, the latter will not be held liable in the *condictio*, although he is liable in an action of theft.[2]

7. The same (on Sabinus, 42). If the claim in an action for the theft (*actio furti*) has been satisfied, it is perfectly clear that this is no bar to the *condictio*: for by such satisfaction the *actio furti* indeed is taken away but not the *condictio*. (1) The *actio furti* is brought to obtain the penalty appointed by law, the

[1] The master is directly liable to the extent to which he has been enriched. For any balance, he must make noxal surrender of the slave if he has not already done so in an *actio furti*.

[2] This appears to be inconsistent with D. 50. 16. 53. 2 where it is stated "aliud factum est eius qui ope, aliud eius qui consilio furtum facit; sic enim alii condici potest alii non potest". Gothofredus considers that in the foregoing passage it is taken for granted that the stolen article has come into the hands of the accomplice and that in the present passage (13. 1. 6) it has not. Another suggestion is that *ope consilio* here is carelessly written for *consilio*. Pothier takes this view.

condictionem neque condictio per furti actionem consumatur. is itaque, cui furtum factum est, habet actionem furti et condictionem et vindicationem, habet et ad exhibendum actionem. (2) Condictio rei furtivae, quia rei habet persecutionem, heredem quoque furis obligat, nec tantum si vivat servus furtivus, sed etiam si decesserit: sed et si apud furis heredem diem suum obiit servus furtivus vel non apud ipsum, post mortem tamen furis, dicendum est condictionem adversus heredem durare. quae in herede diximus, eadem erunt et in ceteris successoribus.

8. IDEM libro vicensimo septimo ad edictum. In re furtiva condictio ipsorum corporum competit: sed utrum tamdiu, quamdiu exstent, an vero et si desierint esse in rebus humanis? et si quidem optulit fur, sine dubio nulla erit condictio: si non optulit, durat condictio aestimationis eius: corpus enim ipsum

condictio to recover the thing itself. This has the effect that neither the *actio furti* is taken away by bringing the *condictio* nor is the *condictio* taken away by bringing the *actio furti*. Accordingly a man, whose property has been stolen, has the *actio furti* and the *condictio* and a *vindicatio*;[1] he has also an action *ad exhibendum* (for production of the thing). (2) The *condictio* for stolen property, seeing that it is *rei persecutoria* (for the recovery of a thing), is available also against the heir of the thief; and not only if the stolen slave be living but also if he be dead: and if the stolen slave met with his death while in the possession of the heir, or even not in his possession, but after the death of the thief, it must be admitted that the *condictio* will survive against the heir. What we have said regarding the heir will apply also in the case of other successors.[2]

8. The same (on the Edict, 27). In a case of theft a *condictio* may be brought to recover the actual things stolen: but is this so only so long as they are in existence, or also even if they have ceased to exist? If indeed the thief has tendered delivery of the thing, then without doubt no *condictio* will be available;[3] if he has not tendered delivery, the *condictio* remains available for the

[1] If the stolen article is still in existence and can be traced, the owner has the option between a *vindicatio* and a *condictio*. But he cannot have both. He must elect.

[2] I.e. universal successors, such as persons granted *bonorum possessio*. Cf. h.t. 5.

[3] By the tender of the thing stolen the thief purges his default, *suam moram purgat*.

praestari non potest. (1) Si ex causa furtiva res condicatur, cuius temporis aestimatio fiat, quaeritur. placet tamen id tempus spectandum, quo res umquam plurimi fuit, maxime cum deteriorem rem factam fur dando non liberatur: semper enim moram fur facere videtur. (2) Novissime dicendum est etiam fructus in hac actione venire.

9. IDEM libro trigensimo ad edictum. In condictione ex causa furtiva non pro parte quae pervenit, sed in solidum tenemur, dum soli heredes sumus, pro parte autem heres pro ea parte, pro qua heres est, tenetur.

10. IDEM libro trigensimo octavo ad edictum. Sive manifestus fur sive nec manifestus sit, poterit ei condici. ita demum autem manifestus fur condictione tenebitur, si deprehensa non fuerit a domino possessio eius: ceterum nemo furum condictione tenetur, posteaquam dominus possessionem adprehendit. et

value thereof: for the thing itself cannot be restored.[1] (1) If a *condictio* is brought claiming a thing on the ground of theft, the question arises as to the time at which the estimate of its value is to be made. It is settled, however, that regard must be had to the time at which the thing was of the greatest value[2] it had ever attained, especially as the thief is not discharged from liability by handing over the thing in a depreciated condition; for a thief is considered to be always in default. (2) Finally it must be observed that the fruits also are within the scope of this action.

9. The same (on the Edict, 30). In the *condictio* on the ground of theft we are liable, assuming that we are sole heirs, not merely for the part of the stolen property which has come to our hands, but for the whole; but the heir to a share is liable (only) in proportion to the share which he takes as heir.

10. The same (on the Edict, 38). Whether a thief be manifest or non-manifest, a *condictio* will lie against him. But a manifest thief will be liable in the *condictio* only if the possession of the stolen property has not been taken from him by the owner; moreover no thief is liable in the *condictio* after the owner has recovered possession. Hence Julian, in order to proceed with

[1] Cf. C. 2. 20. 1; C. 4. 8. 2.

[2] *quo res umquam plurimi fuit.* This means the highest value the thing has borne since the theft was committed. In D. 47. 1. 2. 3 a conflicting view is given, viz. that the highest value after the *condictio* has been brought (*iudicii accipiendi tempus*) is the value taken. The excerpt in question shews that all Ulpian had in mind was to contrast the *c. furtiva* with the *actio ex lege Aquilia.*

ideo Iulianus, ut procedat in fure manifesto tractare de condictione, ita proponit furem deprehensum aut occidisse aut fregisse aut effudisse id quod interceperat. (1) Ei quoque, qui vi bonorum raptorum tenetur, condici posse Iulianus libro vicensimo secundo digestorum significat. (2) Tamdiu autem condictioni locus erit, donec domini facto dominium eius rei ab eo recedat: et ideo si eam rem alienaverit, condicere non poterit. (3) Unde Celsus libro duodecimo digestorum scribit, si rem furtivam dominus pure legaverit furi, heredem ei condicere non posse: sed et si non ipsi furi, sed alii, idem dicendum est cessare condictionem, quia dominium facto testatoris, id est domini, discessit.

11. PAULUS libro trigensimo nono ad edictum. Sed nec legatarius condicere potest: ei enim competit condictio, cui res subrepta est, vel heredi eius: sed vindicare rem legatam ab eo potest.

12. ULPIANUS libro trigensimo octavo ad edictum. Et ideo

the discussion of the *condictio* in the case of a manifest thief, assumes that the thief when caught has either killed or broken or poured away what he had misappropriated. (1) A *condictio* can also be brought against a man who is liable for robbery (*vi bona rapta*): so Julian states in the twenty-second book of his *Digesta*. (2) But the *condictio* is only available until such time as the ownership of the thing passes from the owner by his own act, and therefore, if he has alienated the thing, he cannot bring the *condictio*. (3) Hence Celsus, in the twelfth book of his *Digesta*, states that if the owner has bequeathed the stolen property to the thief unconditionally, his heir cannot bring a *condictio* against the thief: but even if the bequest is not to the thief, but to another person, it must likewise be said that the right to bring the *condictio* is lost, because the ownership has been parted with by the act of the testator, that is of the owner.

11. Paulus (on the Edict, 39). But neither can the legatee bring the *condictio*: for the *condictio* is available (only) to the person from whom the thing has been stolen or to his heir: but the legatee can by a *vindicatio* claim from the thief the thing which has been bequeathed.[1]

12. Ulpianus (on the Edict, 38). And therefore Marcellus

[1] This would be so in the time of Justinian, but in classical law only if the legacy was *per vindicationem*.

eleganter Marcellus definit libro septimo: ait enim: si res mihi subrepta tua remaneat, condices. sed et si dominium non tuo facto amiseris, aeque condices. (1) In communi igitur re eleganter ait interesse, utrum tu provocasti communi dividundo iudicio an provocatus es, ut, si provocasti communi dividundo iudicio, amiseris condictionem, si provocatus es, retineas. (2) Neratius libris membranarum Aristonem existimasse refert eum, cui pignori res data sit, incerti condictione acturum, si ea subrepta est.

13. PAULUS libro trigensimo nono ad edictum. Ex argento subrepto pocula facta condici posse Fulcinius ait: ergo in

states the rule neatly in his seventh book: for he says: if a thing stolen from me remains your property,[1] you have the *condictio*: but also if you have lost the ownership otherwise than by an act of your own, you can bring a *condictio* all the same. (1) Hence, in the case of a thing owned in common, he says correctly that it makes a difference whether you have been the demandant in a suit for partition (*communi dividundo*) or the suit has been brought against you: for, if you were demandant in the partition suit, you will lose the right to bring a *condictio*; if you were the respondent, you retain your right.[2] (2) Neratius, in his books termed *Membranae*, states that it was the opinion of Aristo that a man to whom a thing has been given in pledge can proceed by *condictio incerti* if it has been stolen from him.[3]

13. Paulus (on the Edict, 39). Fulcinius[4] states that cups made from stolen silver can be claimed by *condictio*: hence in a *condictio* for the cups, the value of any engraving which has

[1] *tua remaneat*, i.e. a thing stolen from me which I am holding otherwise than as owner. Ulpian is drawing attention to the fact that although the *actio furti* is given to the person who has an interest that the thing shall be safe, e.g. the *commodatarius* (see J. Inst. IV. 1. 13 and G. III. 203), the *condictio furtiva* is only granted to the owner and his heir. Cf. h.t. 10. 2 and 11.

[2] He who brings the *communi dividundo* is taken to be prepared to give up the ownership in some part or parts of the common property to acquire the complete ownership of another part. Hence whatever is assigned to his co-owner may be considered to be assigned with his consent. But as may be seen in h.t. 10. 2 voluntary alienation of the thing destroys the *condictio*. The person who does not bring the partition action, on the other hand, if the particular article be assigned away from him, loses his ownership, but as the loss is not through any act of his own, he does not lose the *condictio* which accrued to him while he was owner.

[3] Cf. D. 13. 3. 2. An extension of the *condictio* to give a remedy to a person not owner but having a right to possession.

[4] *Fulcinius*. See Roby's *Introduction to the Digest*, p. cxlviii.

condictione poculorum etiam caelaturae aestimatio fiet, quae impensa furis facta est, quemadmodum si infans subreptus adoleverit, aestimatio fit adulescentis, quamvis cura et sumptibus furis creverit

14 IULIANUS libro vicensimo secundo digestorum. Si servus furtivus sub condicione legatus fuerit, pendente ea heres condictionem habebit et, si lite contestata condicio exstiterit, absolutio sequi debebit, perinde ac si idem servus sub condicione liber esse iussus fuisset et lite contestata condicio exstitisset. nam nec petitoris iam interest hominem recipere et res sine dolo malo furis eius esse desiit. quod si pendente condicione iudicaretur, iudex aestimare debebit, quanti emptorem invenerit (1) Cavere autem ex hac actione petitor ei cum quo agitur non debebit (2) Bove subrepto et occiso condictio

been made at the expense of the thief will be taken into account,[1] just as when an infant who has been stolen has grown up, the valuation is made of him as an adolescent, although he has grown up under the care and at the expense of the thief.

14 Julianus (Digesta, 22) If a stolen slave has been given as a legacy subject to a condition, so long as the condition is in suspense, the heir will have the *condictio*,[2] and if after *litis contestatio* the condition has been fulfilled, absolution should follow, just as if the same slave had been directed to receive his freedom on a condition and the condition had been fulfilled after *litis contestatio* for the claimant no longer has any interest in recovering the slave and the subject-matter has ceased to belong to him without any fraud on the part of the thief But if judgment should be obtained while the condition is in suspense, the judge must estimate the sum at which he could find a purchaser (1) But in this action the plaintiff will not be under an obligation to give security to the person against whom the action is brought[3] (2) When an ox has been stolen and slaugh-

[1] *aestimatio fiet* The thief's liability will be measured on the basis of the increased value of the cups by reason of the engraving

[2] Until the condition is fulfilled the heir is owner after the condition has been fulfilled the legatee is owner, but not being a universal successor like the heir, is not entitled to bring a *condictio*, although he can vindicate Cp h t 11 and D 47 2 52 29

[3] What is awarded to the heir is the value of his contingent possession the thief will be liable to a *vindicatio* by the legatee if he does not deliver the legacy to him on the fulfilment of the condition, hence nothing can be required to be returned by the heir and therefore no security is required

et bovis et corii et carnis domino competit, scilicet si et corium et caro contrectata fuerunt: cornua quoque condicentur. sed si dominus condictione bovis pretium consecutus fuerit et postea aliquid eorum, de quibus supra dictum est, condicet, omnimodo exceptione summovetur. contra si corium condixerit et pretium eius consecutus bovem condicet, offerente fure pretium bovis detracto pretio corii doli mali exceptione summovebitur. (3) Idem iuris est uvis subreptis: nam et mustum et vinacia iure condici possunt.

15. CELSUS libro duodecimo digestorum. Quod ab alio servus subripuit, eius nomine liber furti tenetur: condici autem ei non potest, nisi liber contrectavit.

16. POMPONIUS libro trigensimo octavo ad Quintum Mucium. Qui furtum admittit vel re commodata vel deposita utendo, condictione quoque ex furtiva causa obstringitur: quae differt

tered, the owner can bring a *condictio* for the ox and its hide and flesh, that is, assuming the hide and flesh have been dealt with in such a way as to constitute theft: the horns too may be the subject of a *condictio*. But if the owner has recovered the value of the ox in a *condictio* brought by him and afterwards brings a *condictio* for any of the above-mentioned items, he will be entirely barred by an exception. If, on the other hand, he has brought a *condictio* for the hide, and having recovered its value, brings a *condictio* for the ox, he will be barred by the exception of fraud, provided the thief tenders the value of the ox with the value of the hide deducted. (3) The same rule applies in the case of stolen grapes: for both the juice and the skins[1] can rightly be claimed by *condictio*.

§ **15.** Celsus (Digesta, 12). In respect of anything which a slave has stolen from another person he is liable in an *actio furti* when he obtains his freedom: but a *condictio* cannot be brought against him unless he has dealt with the stolen property after becoming free.[2]

16. Pomponius (on Quintus Mucius, 38). A man who is responsible for theft by making improper use of a thing lent to or deposited with him is also liable to a *condictio* on the ground of theft: which action differs from the *actio commodati* in this respect, that even though the thing has been destroyed

[1] *vinacia*="reliquiae uvae expressae" (Dirksen).

[2] In actions of delict *noxa caput sequitur*, but the rule does not extend to actions of quasi-contract such as the *c. furtiva*.

ab actione commodati hoc, quod, etiamsi sine dolo malo et culpa eius interierit res, condictione tamen tenetur, cum in commodati actione non facile ultra culpam et in depositi non ultra dolum malum teneatur is, cum quo depositi agetur.

17. PAPINIANUS libro decimo quaestionum. Parvi refert ad tollendam condictionem, offeratur servus furtivus an in aliud nomen aliumque statum obligationis transferatur: nec me movet, praesens homo fuerit nec ne, cum mora, quae eveniebat ex furto, veluti quadam delegatione finiatur.

18. SCAEVOLA libro quarto quaestionum. Quoniam furtum fit, cum quis indebitos nummos sciens acceperit, videndum, si procurator suos nummos solvat, an ipsi furtum fiat. et Pomponius epistularum libro octavo ipsum condicere ait ex causa furtiva: sed et me condicere, si ratum habeam quod indebitum datum sit. sed altera condictione altera tollitur.

without any intentional wrong-doing or negligence on his part, he is nevertheless responsible in the *condictio*: whereas, in the *actio commodati*, the defendant is not usually liable for anything short of negligence, and, in the *actio depositi*, for anything not amounting to deliberate wrong-doing.[1]

17. Papinianus (Quaestiones, 10). It is of small importance with regard to the extinction of the right to a *condictio* whether the stolen slave is tendered or there is a novation into another form of liability and another ground of obligation: nor am I concerned with the question whether the slave was present or not,[2] seeing that the defendant's default which arose from the theft is terminated as it were by a sort of *delegatio*.

18. Scaevola (Quaestiones, 4). Since it is a case of theft when anyone has received money which was not owing with knowledge of the fact, we must consider the question whether, if a *procurator* makes payment with his own money, it is a theft committed against the *procurator* himself. And Pomponius, in the eighth book of his *Epistolae*, says that the *procurator* himself has the *condictio* on the ground of theft: but that I (the principal) also have a *condictio*, if I have ratified the payment of what was not owing; but the one *condictio* (if brought) puts an end to the right to bring the other.

[1] *cum quo depositi agetur*. The word *depositi* here is clearly superfluous. As to the concurrence of the *condictio* with the actions *bonae fidei* in these cases, see De V. p. 78.

[2] I.e. in the case of a novation. Presence of the stolen slave was necessary in the case of tender: D. 46. 3. 72.

19. PAULUS libro tertio ad Neratium. Iulianus ex persona filiae, quae res amovit, dandam in patrem condictionem in peculium respondit.

20. TRYPHONINUS libro quinto decimo disputationum. Licet fur paratus fuerit excipere condictionem et per me steterit, dum in rebus humanis res fuerat, condicere eam, postea autem perempta est, tamen durare condictionem veteres voluerunt, quia videtur, qui primo invito domino rem contrectaverit, semper in restituenda ea, quam nec debuit auferre, moram facere.

19. Paulus (on Neratius, 3). Julian stated his opinion to be that where a daughter has removed goods[1] (belonging to her husband) a *condictio* must be granted against her father to the extent of her *peculium*.

20. Tryphoninus (Disputationes, 15). Although the thief was prepared to defend a *condictio* and it was in my power to bring a *condictio* for the stolen property while it was still in existence, but afterwards it was destroyed, the early lawyers were nevertheless of opinion that the right to bring a *condictio* would continue, because it seems obvious that a person who at the outset has wrongfully dealt with a thing against the will of the owner is always in default in the matter of restoring to the owner what he never ought to have taken away.[2]

[1] *res amovit*, i.e. has taken something from another member of the domestic circle in circumstances which if taken from a stranger would amount to *furtum*.

[2] The thief *semper in mora est*, so that it is no defence to set up the delay of the plaintiff in bringing the action as having operated to his disadvantage. Cf h.t. 8, 1.

VII. DE CONDICTIONE EX LEGE

D. 13. 2

1. PAULUS libro secundo ad Plautium. Si obligatio lege nova introducta sit nec cautum eadem lege, quo genere actionis experiamur, ex lege agendum est.

Concerning the *condictio* arising under a statute.[1]

1. Paulus (on Plautius, 2). If an obligation has been created by a new statute and no provision has been made in the same as to the kind of action by which we are to proceed, the action must be based on the statute.

[1] See B. p. 547 and Girard, p. 623, n. 1. De Visscher (p. 81) points out that the compilers of the Digest by including this as a separate category in a classification based on *causae* have been guilty of an "illogisme bizarre". While the preceding categories of *condictio* are based on differences of *causae*, this arises from a particular form of creating an obligation, and is completely indifferent to distinctions in the *causae*.

VIII. DE CONDICTIONE TRITICARIA

D. 13. 3

1. ULPIANUS libro vicensimo septimo ad edictum. Qui certam pecuniam numeratam petit, illa actione utitur "si certum petetur": qui autem alias res, per triticariam condictionem petet. et generaliter dicendum est eas res per hanc actionem peti, si quae sint praeter pecuniam numeratam, sive in pondere sive in mensura constent, sive mobiles sint sive soli. quare fundum quoque per hanc actionem petimus et si vectigalis sit sive ius stipulatus quis sit, veluti usum fructum vel servitutem utrorumque praediorum. (1) Rem autem suam per hanc

Concerning the *condictio triticaria*.

1. Ulpianus (on the Edict, 27). A person who claims a definite sum of coined money employs the action termed "*si certum petetur*": but one who claims other things will do so by the *condictio triticaria*.[1] And it must be stated generally that by this form of action those things are sued for which do not fall under the category of coined money, whether they are determined by weight or by measure, and whether they are moveables or relate to the soil. Hence we may also claim land by this form of action, even if it is *ager vectigalis*,[2] or, if one has stipulated for it, a right such as usufruct or a servitude appurtenant to either kind of praedial property (rustic or urban). (1) But no one may claim what is his own property by this form of action, except on those special grounds on which he is enabled to do so, as, for instance, on the ground of theft,[3] or when a moveable has been taken away by force.

[1] This excerpt has been considerably modified by interpolation. It is now generally agreed that the rubric of the Edict "si certum petetur" covered both *certa res* and *certa pecunia*, which would thus both be varieties of *c. certi* (see B. p. 683). The term *triticaria* is almost certainly post-classical and probably was introduced in the course of the attempts by later jurists (possibly Justinian's compilers themselves) to classify *condictiones*.

[2] *ager vectigalis*. See D. 6. 3. As the tenants have not *dominium* their right is one of possession only, but the right being perpetual, subject to the payment of a rent, it is akin to ownership and a *utilis vindicatio* would lie against an intruder.

[3] *odio furum*, G. IV. 4.

actionem nemo petet, nisi ex causis ex quibus potest, veluti ex causa furtiva vel vi mobili abrepta.

2. IDEM libro octavo decimo ad Sabinum. Sed et ei, qui vi aliquem de fundo deiecit, posse fundum condici Sabinus scribit, et ita et Celsus, sed ita, si dominus sit qui deiectus condicat: ceterum si non sit, possessionem eum condicere Celsus ait.

3. IDEM libro vicensimo septimo ad edictum. In hac actione si quaeratur, res quae petita est cuius temporis aestimationem recipiat, verius est quod Servius ait, condemnationis tempus spectandum: si vero desierit esse in rebus humanis, mortis tempus, sed ἐν πλάτει secundum Celsum erit spectandum: non enim debet novissimum vitae tempus aestimari, ne ad exiguum pretium aestimatio redigatur in servo forte mortifere vulnerato. in utroque autem, si post moram deterior res facta sit, Marcellus scribit libro vicensimo habendam aestimationem quanto deterior res facta sit: et ideo, si quis post moram servum eluscatum dederit, nec liberari eum: quare ad tempus morae in his erit reducenda aestimatio.

2. The same (on Sabinus, 18). But Sabinus states that a *condictio* will also lie for the land against a man who has ejected anyone by force from it, and Celsus also is of the same opinion, but subject to the proviso that the person ejected who brings the *condictio* is the owner: however, if he is not owner, Celsus says that he can bring a *condictio* for possession.[1]

3. The same (on the Edict, 27). In this action, if the question is raised as to the time at which the subject-matter of the claim is to be valued, the better opinion is, what Servius asserts, that regard must be had to the time of *condemnatio*: if however (at that time) it has ceased to exist, then (e.g. in the case of a slave) the time of death, but, according to Celsus, a broad view must be taken: for the latest period of existence ought not to be taken for the valuation, lest it should be reduced to a very small amount, as, for instance, in the case of a slave mortally wounded. But, in either case,[2] if the thing has decreased in value after default has taken place, Marcellus, in his twentieth book, says that an estimate must be made of the amount by which the thing has depreciated: and, therefore, if the defendant has handed over a slave who, after default has occurred, has lost an

[1] The action in this case would be a *condictio incerti*.

[2] Whether the thing is still in existence or not.

4. GAIUS libro nono ad edictum provinciale. Si merx aliqua, quae certo die dari debebat, petita sit, veluti vinum oleum frumentum, tanti litem aestimandam Cassius ait, quanti fuisset eo die, quo dari debuit: si de die nihil convenit, quanti tunc, cum iudicium acciperetur. idemque iuris in loco esse, ut primum aestimatio sumatur eius loci, quo dari debuit, si de loco nihil convenit, is locus spectetur, quo peteretur. quod et de ceteris rebus iuris est.

eye, he is not discharged from liability: hence, in such cases, the valuation must be referred back to the time of default.[1]

4. Gaius (on the Provincial Edict, 9). If any kind of merchandise, which ought to have been handed over on a particular day, is the subject of the claim, as, for instance, wine, oil, or corn, Cassius says that the subject-matter of the suit must be estimated at its value on the day on which it ought to have been handed over: but, if there was no agreement as to the day, according to its value at the time of joinder of issue in the action.[2] And the same rule applies as to place, so that the valuation is to be made in the first instance with reference to that place where the goods ought to be handed over, but if there was no agreement as to place, regard must be had to the place in which the action was brought. And this principle is applicable to other matters also.

[1] This is in accordance with the rules given in D. 13. 1. 8. 1 and D. 45. 1. 59 and 60, bearing in mind that a thief is always deemed to be *in mora*.

[2] Unless the defendant was *in mora*; for then the plaintiff can claim the highest value since the time of default, if that is greater than the value at the time of *litis contestatio*. Cf. D. 13. 1. 8. 1; 13. 1. 20; 45. 1. 59 and 60.

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